03-0106

IN THE SUPREME COURT
STATE OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent-[redacted]

vs. Appeal No. 03-0106-CR

SCOTT R. JENSEN, STEVEN M. FOTI
and SHERRY L. SCHULTZ,

Defendants-Appellants-Petitioners.

APPEAL FROM THE DECISION OF THE COURT OF APPEALS, DISTRICT IV ENTERED ON APRIL 1, 2004, AFFIRMING DECISION AND ORDER ENTERED IN DANE COUNTY CIRCUIT COURT ON JANUARY 10, 2003, THE HONORABLE DANIEL R. MOESER, PRESIDING

BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS-PETITIONERS SCOTT R. JENSEN, STEVEN M. FOTI AND SHERRY L. SCHULTZ

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INTRODUCTION

A basic and fundamental premise of criminal law in American jurisprudence is "*nullum crimin sine lege, nulla poena sine lege*"- - "no crime or punishment without law." This premise is governed by a variety of interrelated legal doctrines, including the constitutionally-mandated void for vagueness doctrine, the rule of strict construction of penal statutes, the abolition of common law crimes, the prohibition against judicially created offenses and the related prohibition against ex post facto judicial decisions. *See* 1 Wayne R. LaFave, *Substantive Criminal Law* §§2.1, 2.2(d), 2.3 and 2.4(c)(2d ed. 2003); 1 Paul H. Robinson, *Criminal Law Defenses* §35(a) (1984).

Wisconsin law is in accord. A criminal statute is unconstitutionally vague if it lacks either fair notice or proper standards for adjudication. *State v. Pittman,* 174 Wis. 2d 255, 276, 496 N.W.2d 74, *cert. denied,* 510 U.S. 845 (1993)."[W]hen there is doubt as to the meaning of a criminal statute, courts should apply the rule of lenity and interpret the statute in favor of the accused." *State v. Jackson,* 2004 WI 29, ¶ 12, 270 Wis. 2d 113, 676 N.W.2d 872, 875. Courts must look to the legislature's definition of a crime in construing a statute and not the common law definition. *State v. Genova,* 77 Wis. 2d 141, 145, 252 N.W.2d 380 (1977). "[C]rimes are exclusively statutory, the task of defining criminal conduct is entirely within the

legislative domain." *State v. Baldwin*, 101 Wis. 2d 441, 447, 304 N.W.2d 742 (1981). A deprivation of due process can occur from retroactive judicial interpretation -- Monday morning quarterbacking -- of statutory language. *Elections Board of the State of Wisconsin v. Wisconsin Manufacturers & Commerce*, 227 Wis. 2d 650, 679-80, 597 N.W.2d 721 (1999).

The violence done to these principles and doctrines by the court of appeals in this case is immeasurable. With a single decision, the court of appeals has set Wisconsin criminal law jurisprudence back to a time prior to statehood and has eliminated any restraints upon political prosecutions.

Defendants-appellants-petitioners Scott Jensen (Jensen), Steven Foti (Foti) and Sherry Schultz (Schultz) (collectively "petitioners") are charged with misconduct in public office, a felony. Proof of this offense requires the state to establish that each of them in his or her official capacity and with intent to obtain a dishonest advantage for himself/herself or another, exercised a discretionary power in a manner inconsistent with the duties of his or her office or employment. *See* §946.12(3), *Stats.*; *see also* Wis. JI Crim. 1732.

No statutes, rules or caselaw exist to define or otherwise describe the duties of any legislator or aide under this criminal statute. Despite the lack of any definitions, the state urged, and the court of appeals agreed in this

case of first impression, that a definition of duties could be created by reference to a variety of sources outside the criminal code. Using a methodology that can best be described as something akin to a medieval alchemist's recipe book for turning lead into gold, the court of appeals manufactured a definition of duties gleaned from a collective reading of sources. Those sources included: an assembly employee handbook, two emails, a memo and statutes excerpted from Chapters 11, 12 and 19. Specifically rejected by the court of appeals as sources to consider were Assembly Rule 2 (party officer's duties), Assembly Rule 3 (duties of the speaker) and duties imposed upon state offices and employees by custom and historical development.

The contorted process the court of appeals undertook to analyze this case betrays its ultimate conclusion. How can this criminal statute as applied not be vague when the court had to violate fundamental constitutional and judicial doctrine in order to save it? It should be a given that under no set of circumstances should a criminal prosecution be pursued to advance desired political reform. However, this is such a case, and for that reason it requires greater vigilance in the commitment to constitutional protections.

The court of appeals decided this case by first determining that "political activity" is prohibited under the misconduct statute while "legislative activity" is permissible. The court stated on several occasions that "political activity" was not allowed by a legislator on state time. For example, "[w]e can find no duty that allows Jensen and Foti to engage in political activity on state time with state resources." *Jensen*, ¶ 32; App.A014). "It is unreasonable to equate 'political activity' with 'legislative activity.'" *Id.* at ¶ 25; App.A011). *See also* ¶¶ 26, 27, 33 and 36; App.A011-12, A014-15).

The usual definitions for these words, however, do not place a bright line between the meaning of political activity and legislative activity. The word "political" is defined as: "Pertaining to politics; of or relating to the conduct of government." BLACK'S LAW DICTIONARY, 7th Ed. (1999). "Politics" is defined as: "1. The science of the organization and administration of the state. 2. The activity or profession of engaging in political affairs." *Id.* A non-legal dictionary definition of "political" is: "1. Of or relating to the affairs of government, politics or the state. 2. Characteristic of politics, parties of politicians." THE AMERICAN HERITAGE DICTIONARY, 3rd Ed. (1993). The phrase "political activity" is

more of a synonym for "legislative activity" than an antonym as used by the court of appeals.

The court has based its reasoning on what it found to be a clear line of demarcation between "legislative activity" and "political activity." *Jensen*, at ¶ 36; App.A015). This dichotomy is contradicted by the common dictionary definition of the terms. In reality, this distinction does not exist. As one court succinctly observed, "[p]olitics and political consideration are inseparable from legislative activity." *Gordon v. Griffith*, 88 F. Supp. 2d 38, 45 (E.D. N.Y. 2000). The court of appeals has created either an incorrect or a vague definition and applied that definition to the facts of this case in order to find that the complaint adequately describes the crime of criminal misconduct.

This case presents a legal issue of first impression in the State of Wisconsin -- may legislative leaders or a legislative aide be prosecuted for felony misconduct in office as a result of conduct which, at its core, is a part of the day-to-day work of political leaders, *i.e.*, partisan political conduct intended to promote and advance the legislative agenda and the elections of like-minded legislators? The state's theory of prosecution and the court of appeals' interpretation of the statute as applied violates the Due Process clause and the Doctrine of Separation of Powers. Petitioners

urge this Court to reverse the court of appeals' ruling in order to preserve the constitutional and judicial protections available to accused persons and to protect its citizens from arbitrary and *ad hoc* prosecutions by local district attorneys.

STATEMENT OF ISSUES

1. Is section 946.12(3), *Stats.*, unconstitutionally vague as applied when an element of a criminal offense is undefined and it becomes necessary for the prosecution and the court to create a definition gleaned from a collective reading of selectively chosen non-statutory or non-criminal sources?

COURT OF APPEALS' ANSWER: No.

2. Is section 946.12(3), *Stats.*, unconstitutionally vague as applied and in violation of the Separation of Powers Doctrine when a key element of the offense must be defined by the terms "political activity" or "campaign-related activity," terms that are themselves capable of multiple definitions, including definitions or activity that is inherent to the legislative branch?

COURT OF APPEALS' ANSWER: No.

3. Is section 946.12(3), *Stats.*, unconstitutionally vague as applied and overbroad where the prosecution and the court of appeals created a

novel definition for one of the elements of the offense, which clearly implicates activity protected by the First Amendment?

COURT OF APPEALS' ANSWER: No.

4. Do Separation of Powers principles preclude this prosecution?

COURT OF APPEALS' ANSWER: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This appeal presents an issue of first impression and is a matter of statewide importance. Other than the court of appeals' decision below, no other case or statute has addressed whether engaging in political or campaign-related activity while on state time or using state resources constitutes misconduct in public office contrary to section 946.12(3). In addition, no statute or opinion addresses the scope of or the distinction between legislative work versus political or campaign work in a manner that allows a court or counsel to discern when conduct rises to the level of misconduct in violation of the criminal statute.

The implications to the balance of power between the executive and the legislative branches, as well as the impact on the underlying principles of criminal law, warrants oral argument to ensure that every question and every policy consideration may be fully explored. Given the nature of this

case, this Court should grant oral argument and the decision should be published.

STATEMENT OF THE CASE

A. Nature of the Case.

Petitioners seek reversal of the court of appeals' decision affirming the circuit court's denial of their motions to dismiss the complaint charging felony misconduct in public office, contrary to section 946.12(3), *Stats.* The offense requires proof, as an element of the offense, that a defendant exercised a discretionary power in a manner inconsistent with the duties of the office or employment. As applied, section 946.12(3), *Stats.*, is vague and overbroad, contrary to the Due Process Clause and violative of the Separation of Powers Doctrine.

B. Course of Proceedings.

On October 18, 2002, the state issued a forty-seven page criminal complaint against petitioners. (R.1). Count one of the complaint charged Jensen and Foti with misconduct in public office, contrary to section 946.12(3), *Stats.* (*Id.*). Counts three and four alleged two additional misconduct in public office charges against Jensen. (*Id.*). Schultz was charged separately in count two. (*Id.*).

Petitioners moved to dismiss the criminal complaint on various grounds on December 13, 2002. (R.9-R.11). On December 20, 2002, Jensen filed additional motions and supporting documents, which were joined in by Foti and Schultz (R.9:2), detailing additional grounds for dismissal of the complaint. (R.13-R.19).

After briefing by the parties, the circuit court, the Honorable Daniel R. Moeser, heard oral arguments on the motions on January 10, 2003. (R.23; R.42). At the close of that hearing, Judge Moeser denied the motions. (R.25; App.A047-48). On January 13, 2003, petitioners filed a petition for leave to appeal with the court of appeals. (*See* R.29). Petitioners were bound over for trial following a preliminary hearing. (R.45:4).

On February 18, 2003, the court of appeals granted the petition for leave to appeal and certified the issues in the petition to the Wisconsin Supreme Court. (*See* R.35; R.37; App.A039-46). This Court denied certification on March 13, 2003. (R.40). After briefing and oral argument, the court of appeals affirmed the circuit court's decision in an opinion issued April 1, 2004. This Court accepted review of that decision on June 22, 2004.

STATEMENT OF THE FACTS

In its forty-seven page criminal complaint, the state cited four sources as the legal bases for the allegation that petitioners acted inconsistent with their respective duties:

- a report of the Chief Assembly Clerk dated September 4, 2001;
- an email dated February 27, 1997;
- an email that is not described as to content sent every election year; and
- a 1978 Ethics Board opinion.

(R.1:5-6). When petitioners moved to dismiss the charges because these materials did not form a factual or legal basis for misconduct in public office charges, the prosecutor responded by asserting that the duties of legislators and their aides were set forth in a mosaic reading of Chapters 11, 12 and 19, *Stats.* (R.21:8-21). The need for the prosecution to rely on these various outside sources was predicated in part on its admission, during the motion hearing in front of Judge Moeser, that section 946.12(3), *Stats.*, does not identify the duties of a public official, including the duties of petitioners in this case. (R.42:41-42).

During that hearing, the prosecutor added:

> *The duty does have to be a clear statute.* I think the law that's not being referred to anymore, but that was in the defendants' opening thrust, was, "Look, the state is relying on mere e-mails and internal regulations." That's not the case. The state is relying on statutory felonies -- the statutes that are clear.

(R.42:71) (emphasis added).

In his decision on the motion to dismiss, the circuit court, the Honorable Daniel R. Moeser, stated: "[The criminal complaint] is weak with respect to the duties of the defendants, especially with respect to the duties of Ms. Schultz . . . ." He added, "I fully admit that one has to do some work and some reorganizing to find duties and responsibilities, especially with respect to the duties of Ms. Schultz." He concluded: "It is not a duty of employment to use state time, money, resources to solicit money and assist in private campaigns or to direct someone to do it, and I think that's easily discernable from the statutes, the Ethics Code, the e-mails[.]" (R.42:87-88).

By the time of the preliminary hearing, the state was no longer relying on the report of the Chief Assembly Clerk dated September 4, 2001, but rather the Assembly Employe Handbook. (R.43:29; R.32:Exh.7). The Assembly Rules, in particular Rules 2 and 3, were attached to Jensen's motion to dismiss the complaint for lack of probable cause per *State v. Mann*, 135 Wis. 2d 420, 400 N.W.2d 489 (Ct. App. 1986). (R.16; R.17). The circuit court took judicial notice of the Assembly Rules during the preliminary examination. (R.43:65).

At the conclusion of the preliminary hearing, the circuit court grappled with the concepts of legislative activity and campaign activity. After noting, " . . . that different people could disagree when a statute is being applied in a particular way, especially for the first time[,]" (R.44:298), the court concluded as to Schultz, "[p]art of what she did appears to be either legitimate or what we could call a gray area." (R.44:300). With respect to the decision binding petitioners over for trial, the court also observed, " . . . I frankly think some of the activities, as one of the witnesses said, blur between legitimate activity and purely campaign activity . . . when you talk about the duties of legislators, I think they are hard to define." (R.44:302-03).

STANDARD OF REVIEW

Petitioners challenge the constitutionality of section 946.12(3), *Stats,* as applied to their case, on grounds that the statute is vague, overbroad and violates the doctrine of separation of powers. "The constitutionality of a statute presents a question of law that this court reviews *de novo*, without deference to the decisions of the circuit court or the court of appeals." *State v. Cole,* 2003 WI 112, ¶10, 264 Wis. 2d 520, 665 N.W.2d 328. Constitutional questions, both state and federal, including separation of powers issues, are decided *de novo. In Re John Doe Proceeding*, 2004 WI 65, ¶6, ___ Wis. 2d

___, 680 N.W.2d 792. Similarly, statutory interpretation also presents a question of law subject to independent review. *Jackson*, at ¶11, 676 N.W.2d at 875.

ARGUMENT

I. WHEN AN ELEMENT OF AN OFFENSE IS UNDEFINED IN A CRIMINAL STATUTE AND A DEFINITION IS CREATED BY THE COURT FROM MULTIPLE OTHER SOURCES, THE STATUTE IS UNCONSTITUTIONALLY VAGUE.

A. A Criminal Statute Is Vague If It Lacks Either "Fair Notice" or Proper Standards for Adjudication.

Wisconsin has adopted a two-prong test to determine whether a statute is unconstitutionally vague. First, does the statute sufficiently warn persons "wishing to obey the law that [their] . . . conduct comes near the proscribed area?" And second, may those who must enforce and apply the law do so "without creating or applying their own standards?" *Pittman*, 174 Wis. 2d at 276. In other words, a criminal statute is unconstitutionally vague if it lacks either fair notice or proper standards for adjudication of conduct. *State v. Corcoran*, 186 Wis. 2d 616, 632, 522 N.W.2d 226 (Ct. App. 1994) (citing *State v. Barman*, 183 Wis. 2d 180, 197, 515 N.W.2d 493 (Ct. App. 1994)).

While a statute need not define with absolute clarity and precision what is and what is not unlawful conduct, it is void for vagueness if it is

unduly ambiguous such that "one bent on obedience may not discern when the region of proscribed conduct is neared, or such that the trier of fact in ascertaining guilt or innocence is relegated to creating and applying its own standards of culpability rather than applying standards prescribed in the statute or rule." *Pittman*, 174 Wis. 2d at 276-77. *See also Corcoran*, 186 Wis. 2d at 632 (requiring "ambiguity or uncertainty in the description of the duty imposed or conduct prohibited").

A law regulating conduct must give adequate notice of what is prohibited, so as not to delegate "basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates essential due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). In the context of the facts of this case, section 946.12(3), *Stats.*, neither provides adequate notice nor is enforceable without the interference of the subjective, personal standards of the prosecution.

B. Section 946.12(3), *Stats.*, Is Unconstitutionally Vague As Applied Because It Fails To Define "Duty."

As the court of appeals recognized in its certification to this Court, "no statute or group of statutes generally or specifically prohibits campaigning or directing others to campaign on state time or using state resources. For that matter, we find no explicit general prohibition against campaigning on state time using state resources." *State v. Jensen*, 2003 WL 349659 *5 (Ct. App., February 18, 2003) (App.A039-46)[1].

The prosecution and the lower court have had difficulty creating a consistent listing of the duties these petitioners were to perform and identifying the sources of those duties. The criminal complaint listed four duties based on two emails, a report of the Chief Assembly Clerk and an Ethics opinion, but no statutory duties. The prosecutor added the argument that the duty has "to be a clear statute," and Judge Moeser, in ruling on the motions to dismiss, included duties he found in the statutes, the Ethics Code and the emails.

The court of appeals referred to the four non-statutory provisions cited in the complaint and added a list of five statutory sections. None of

[1] Petitioners note there is one statute, section 230.40, *Stats.*, that prohibits political activity on state time. That statute is limited to those employees holding a position in the classified civil service. All three petitioners are exempt from this statute as they are by definition a member of the unclassified service. §§230.08(2)(a)&(f), *Stats.*

the five statutes contain any reference to section 946.12, nor are these statutory provisions criminal in nature. One of the provisions referred to by the court of appeals is section 12.07(3), a statute that prohibits an employer from giving an employee a notice that the employee will lose wages or a job in the event a certain candidate is elected. Obviously, this provision has nothing to do with the allegations involved in this case.

There has been no consistency to the identification of the duties to be performed or avoided by petitioners. The list of duties enumerated by the court of appeals, the circuit court and the prosecutor are open-ended and unclear for purposes of a criminal case. These are not definitions: they are attempts to rescue a patently ambiguous and vague statute.

The Wisconsin Statutes are replete with statutes that, unlike section 946.12(3), define "duties." For example: section 59.27, *Stats.*, duties of a sheriff; section 120.16, *Stats.*, duties of a school district treasurer; section 59.42, *Stats.*, duties of corporation counsel; section 60.33, *Stats.*, duties of town clerk; section 60.34, *Stats.*, duties of town treasurer; section 62.09, *Stats.*, comprehensive delineation of duties of city officials; section 115.28, *Stats.*, general duties -- State Superintendent of Public Instruction; sections 165.25 and 165.70, *Stats.*, duties of members of the Department of Justice. There is no specific statute that sets forth the duties

of a legislator, a legislative leader or an aide. The absence of such a statute is not surprising in light of the plenary power of the state legislature, *State ex rel. McCormack v. Foley*, 18 Wis. 2d 274, 277-280, 118 N.W.2d 211 (1962), and the fact that the legislature is the political branch of government. *People v. Ohrenstein*, 77 N.Y. 2d 38, 47, 563 N.Y.S. 2d 744 (1990).

Faced with no statutory definition of "duty," the state attempted to create one based on an amalgam of selectively chosen sources. In accepting the state's approach, the court of appeals disregarded two sources that directly addressed the duties of Jensen and Foti. Assembly Rule 2(1), which provides in part that party officers shall perform the duties assigned to them by their respective caucuses, and Assembly Rule 3(s) provides in part that the speaker shall perform any other duties assigned by custom. The court of appeals also failed to consider those duties that have developed historically, or the duties imposed by custom and routine practices, including the party officers' promotion of the party's agenda. Instead, the court chose, at the state's urging, to create its own definition of duties from a collective reading of the sources for the sole purpose of this prosecution.

The court of appeals' creation of this "definition" from multiple outside sources confirms that, at a minimum, the phrase "inconsistent with

one's duty" is ambiguous. *See State v. Sample*, 215 Wis. 2d 486, 495, 573 N.W.2d 187 (1998) (court does not look beyond statutory language to ascertain its meaning unless the language is ambiguous). As LaFave noted, it is often difficult "to determine whether uncertain language in a statute renders it ambiguous, so that it may be narrowly construed and thus remain valid, or whether the language makes the statute vague, so that it is void." 1 LaFave, *supra*, section 2.3(b) at 149.

The court of appeals' novel method of statutory construction violates the rule of strict construction of penal statutes, the prohibition against judicially created offenses and retroactive judicial interpretation. But the most patent indicator of the constitutional vagueness of the statute is the use of non-statutory sources and non-criminal statutes by the court of appeals to reach its desired result. As a matter of common sense, how can a person have "fair notice" of proscribed conduct and penalties when a court determines that an element of the offense can only be defined by a selective amalgamation of emails, ethics opinions, policy statements and non-criminal statutes?

Can the court of appeals go to the extremes that it did to save a statute that is vague as applied? Under this Court's reasoning in *State v. Popanz*, 112 Wis. 2d 166, 332 N.W.2d 750 (1983), the answer is no. The

similarities between the cases are compelling. In *Popanz*, the court was faced with whether the phrase "private school" contained in section 118.15(1)(a), *Stats.*, was unconstitutionally vague. The State Superintendent of Public Instruction, in an amicus brief, proposed a specific definition for the court to consider. The court of appeals proposed a slightly different definition. In response, this Court ruled:

> We are not convinced that these definitions are the only ones a citizen, an administrator, or a court using dictionary definitions, court decisions and the statutes could deduce. In any event the legislature or its delegated agent should define the phrase "private school"; citizens or the court should not have to guess at its meaning.

Popanz, 112 Wis. 2d at 175.

The statutory phrase at issue in this case is not only ambiguous, but also vague. Although the court of appeals supplied a definition, it is not the only definition that could be deduced. Like the statutory definition of "private school" in *Popanz*, the definition of "duties" in section 946.12(3) requires petitioners, the state, courts and ordinary citizens to guess at its meaning. Applying *Popanz*, section 946.12(3) is vague insofar as it fails to define "duties" and, therefore, the court of appeals ruling should be reversed and the filing charges against petitioners should be dismissed.

C. Other States Faced With Similar Challenges Have Held Their Misconduct In Public Office Statutes To Be Unconstitutionally Vague.

The lack of a specific statutory definition in Wisconsin's misconduct law opens the door for prosecutorial discretion or interpretation. The experience in other states with statutes attempting to impose similar proscriptions helps to show why the Wisconsin statute is both vague and overbroad and thus constitutionally infirm as applied.

The Florida Supreme Court found parts of that state's misconduct statute to be unconstitutional on two occasions. In *State v. DeLeo*, 356 So.2d 306 (Fla. 1978), a vagueness challenge was made to that portion of the misconduct statute that imposed criminal liability on a public servant who knowingly violated "any statute, rule or lawfully adopted regulation or rule relating to his office." *Id.* at 307. The court noted that this provision was keyed into the violation of "any statute, rule or regulation, pertaining to the office of the accused, whether they contained criminal penalties themselves or not, and no matter how minor or trivial." *Id.* at 308. The court determined that the statute was simply too open-ended to limit prosecutorial discretion in any reasonable way. *Id.* It observed, "the statute could be used, at best, to prosecute, as a crime, the most insignificant of transactions or, at worst, to misuse the judicial process for

political purposes." *Id.* The State of Wisconsin's application of section 946.12(3) in this case suffers from a similar infirmity.

Seven years later, another subsection of Florida's misconduct statute was found to be unconstitutionally vague in *State v. Jenkins*, 469 So.2d 733 (Fla. 1985). The court was asked to determine whether a provision providing that a public servant who refrains from performing a duty imposed upon him by law was unconstitutionally vague. The court found that this subsection of the misconduct statute suffered from the same vulnerability to arbitrary application as did the subsection at issue in *DeLeo*. The court said that this statute "allows the imposition of criminal sanctions for the failure to perform duties imposed by statutes, rules or regulations that may themselves impose either a lesser penalty or no penalty at all." *Id.* at 734.

The Colorado Supreme Court severed its misconduct in public office statute by finding one part constitutional while finding a separate part to be unconstitutionally vague in the case of *People v. Beruman*, 638 P.2d 789 (1982). The defendant had been charged for failing to properly respond to a report of suspected child abuse. The statutory prohibition addressed a public servant who "knowingly, arbitrarily and capriciously: (a) Refrains from performing a duty imposed upon him by law or clearly inherent in

the nature of his office . . . ." *Beruman* at 791. The court found that the prohibition involving duties "imposed upon him by law" was not unconstitutionally vague because the statute referred to "a duty prescribed by a legislative enactment, a legally adopted administrative rule or regulation, or a judicial pronouncement defining mandatory duties required of a specific public office." *Beruman, supra,* at 793. However, in finding the other part of the misconduct statute to be unconstitutionally vague, the court stated:

> The language used to describe the proscribed conduct -- "refrains from performing a duty . . . clearly inherent in the nature of his office" -- provides no readily ascertainable standards by which one's conduct may be measured. The legislature has failed to define that phrase, and it is totally without parameters for the determination of guilt or innocence, thus allowing the exercise of unbridled discretion by the police, judge and jury.

Beruman, supra, at 793.

The Kansas Supreme Court found violations of due process for a misconduct statute that prohibited a public officer or employee from "willfully and maliciously committing an act of oppression, partiality, misconduct or abuse of authority . . . ." *State v. Adams,* 866 P.2d 1017, 1019 (1994). After discussing the *DeLeo* decision and noting that the Kansas statute did not expressly allow for prosecutions of trivial rules, the court said that the Kansas statute "does not restrict prosecutions to significant

transactions. In fact, there is a complete absence of any link with recognized behavioral standards." *Adams, supra,* at 1023. The word "misconduct" was observed to be "in the eye of the beholder," *id.*, and for that reason the statute was vague and violative of due process clause.

An official misconduct violation based on "common law duties" or "duties inherent in the nature of the office" is unconstitutionally vague because this language does not provide any readily ascertainable standard to measure a person's conduct. *See Beruman, supra; Conrad, supra; see also State v. Rosenfeld,* 467 So.2d 731 (Fla. 3d Dist. Ct. App. 1985); *Moosbrugger v. State,* 461 So.2d 1033 (Fla. 2d Dist. Ct. App. 1985). There are no parameters for the determination of guilt or innocence, thus allowing the exercise of unbridled discretion by the police, judge and jury. The vague language impermissibly infringes on the constitutional safeguards of fundamental fairness and due process and creates a danger of arbitrary enforcement. Petitioners urge this Court to follow the lead of these other states and conclude that the absence of a definition of "duties" in section 946.12(3), renders that statute constitutionally unenforceable.

D. Several States Have Found Misconduct Statutes To Be Valid When The Duties Are Defined By Statute.

Several other jurisdictions have determined that a violation of an "official misconduct" statute is constitutional because the "duty" that is

alleged to have been violated is specifically defined by statute. *See, e.g., Dill v. State*, 723 So.2d 787 (Ala. Crim. App. 1998); *Hunt v. State*, 642 So. 2d 999 (Ala. Crim. App. 1994); *Steele v. State*, 227 Ga. 653, 182 S.E.2d 475 (Ga. 1971); *Cook v. State*, 256 Ga. 808, 353 S.E.2d 333 (Ga. 1987); *People v. Selby*, 298 Ill.App.3d 605, 698 N.E.2d 1102, 232 Ill.Dec. 672 (Ill. App. Ct. 1998); *People v. Kleffman*, 90 Ill.App.3d 1, 412 N.E.2d 1057, 45 Ill.Dec. 475 (Ill. App. Ct. 1980); *Clark v. Weeks*, 414 F. Supp. 703, 707 (N.D. Ill. 1976); *State v. Perret*, 563 So.2d 459 (La. Ct. App. 1990); *Whitfield v. Fraser*, 272 F. Supp. 2d 340 (S.D.N.Y. 2003); *Commonwealth v. Manlin*, 270 Pa.Super 290, 411 A.2d 532 (Penn. 1979); *Sanchez v. State*, 995 S.W.2d 677 (Tex. Crim. App. 1999); *Prevo v. State*, 778 S.W.2d 520 (Tex. Ct. App. 1989).

In *Clark*, a county treasurer challenged the constitutionality of an Illinois misconduct in office statute that was being used by a special committee to investigate the treasurer's alleged improprieties in office. *Clark*, 414 F.Supp. at 707. Specifically, the treasurer argued that the phrase "misconduct in office" as written in the statute, was unconstitutionally vague. *Id.* The court rejected the treasurer's constitutional challenge because Illinois statutes defined the three violations that constituted "misconduct in office" under Illinois' official misconduct statute. *Clark*,

414 F.Supp. at 708. Unlike Wisconsin, Illinois statutes specifically defined the violated duty under its misconduct statute.

E. The Court of Appeals Misapplied Wisconsin Law Governing Statutory Construction.

At the state's urging, the court of appeals engaged in statutory construction after apparently determining that section 946.12(3) was ambiguous. Exactly what doctrines of statutory construction the court of appeals applied and relied on is unclear. What is clear is that the state and the court of appeals ignored and disregarded two of the most prominent and steadfast rules of statutory construction.

First, the court of appeals disregarded the fundamental principle of statutory construction that "[w]hen there is doubt as to the meaning of a criminal statute, courts should apply the rule of lenity and interpret the statute in favor of the accused." *Jackson,* at ¶12. The court of appeals ignored the rule of lenity and interpreted the statute in favor of the prosecution.

Second, the court disregarded the maxim that when the legislature enacts a statute, it does so with full knowledge of all existing laws and statutes. *See Mack v. Joint School District No. 3,* 92 Wis. 2d 476, 489, 285 N.W.2d 604 (1979). In other words, the court of appeals interpreted this statute enacted in 1955 by applying subsequently created statutes and non-

judicial opinions. These more recent sources used for construction of section 946.12 do not attempt to incorporate or even refer to the statute nor do they impose a criminal prohibition. Yet, the court of appeals applied these subsequent sources as if they were contemplated when the statute was adopted almost fifty years ago. This is improper statutory construction and violates *Mack*.

Indicative of the court of appeals' selective method of statutory construction was its refusal to consider the legislative history evidenced by the Wisconsin Criminal Jury Instructions. The initial jury instruction for section 946.12(3)[2] was approved in 1966 and provided: "(here describe particular duty or duties imposed upon defendant by applicable statutes which provide the basis for the state's claim . . . .)" (emphasis added). Today's version of instruction 1732 is very similar to the original instruction, except that the actual duty is left blank in the instruction and a footnote provides:

> Describe in this blank the particular duty or duties imposed upon defendant *by applicable statutes* which provide the basis for the state's claim that he acted in violation of his duty or employment or in violation of the rights of others, *e.g.*, it was the sheriff's duty to enforce the law with respect to keeping the peace, etc.

[2] For whatever reason the court of appeals looked to the legislative history for a different subsection, *i.e.*, section 946.12(1). One of the other problems with doing that is addressed in the next section.

Wis. JI Crim. 1732 n.7 (emphasis added). It is obvious that the drafters of the jury instruction understood that the duties for a subsection 3 violation had to be set forth in the statutes.

In *Genova,* 77 Wis. 2d at 149-51, this Court analyzed section 943.20, *Stats.,* relying on a jury instruction approved at the same time as the misconduct instruction. The *Genova* court observed that the architects of the jury instructions included the same people involved in the revision of the criminal code in the early 1950's. As a result, although acknowledging that jury instruction comments and instructions are not binding, the *Genova* court concluded that they are "an authoritative statement of legislative intention." *Id.* at 151; *see also Nommensen v. American Continental Insurance Company,* 2001 WI 112, ¶ 47, 246 Wis. 2d 132, 629 N.W.2d 301.

F. The Court Of Appeals Violated Due Process By Engaging In Retroactive Judicial Interpretation Of Section 946.12(3).

The court of appeals attempts to justify its foray into all of these outside sources by reference to 1953 legislative history. In particular, it noted that the term "duty" under section 946.12(1), *Stats.,* "may be imposed by common law, statute, municipal ordinance, administrative regulation and perhaps other sources . . . ." *Jensen,* at ¶17 (quoting

Judiciary Committee Report on Criminal Code, Wisconsin Legislative Council 1953, p. 176) (App.A008).

There are several problems with this approach. First, the duties described in section 946.12(1) involve a "known mandatory, nondiscretionary, ministerial duty . . ." while subsection (3) involves a much broader prohibition encompassing all duties of an officer or employee. If the committee had intended to imply its reasoning for "mandatory" duties from subsection (1) to subsection (3), it is reasonable to believe the committee would have made that type of statement in its comments.

Second, this committee comment did not authorize creation of a definition of duty from a collective reading of multiple sources, nor did it authorize the prosecution and the courts to disregard recognized rules of statutory construction.

Third, and more importantly, this committee comment was modified by *State v. Dekker*, 112 Wis. 2d 304, 332 N.W.2d 816 (Ct. App. 1983), the controlling authority at the time the conduct alleged in the criminal complaint occurred. In *Dekker*, the court ruled:

> The failure to carry out a duty contained in a departmental rule cannot be bootstrapped into the felony of misconduct in public office. It is contrary to public policy to convert a departmental disciplinary rule into a crime, except if the

> departmental rule specifically prohibits some form of criminal conduct.

Id., 112 Wis. 2d at 312.

Here, the court of appeals missed not only the problem recognized in *Dekker, i.e.*, the policy implication of making violation of a work rule a felony, but also the fact that *Dekker* was binding precedent at the time the conduct alleged in the complaint against the petitioners supposedly took place. In effect, the court engaged in retroactive judicial interpretation of a statute, contrary to *Elections Board of the State of Wisconsin v. Wisconsin Manufacturers & Commerce*, 227 Wis. 2d 650, 597, N.W.2d 721 (1999).

In *Elections Board*, this Court considered whether retroactive interpretation of statutory language violated due process. Citing *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964), the court confirmed that "a deprivation of the due process right of fair warning can occur not only from vague statutory language, but also from unforeseeable and retroactive interpretation of that statutory language." *Elections Board*, 227 Wis. 2d at 679-80. This Court also adopted the *Bouie* Court's determination that a retroactive interpretation of statutory language is an even worse due process violation than a vague statute. This is because a retroactive interpretation "'lulls the potential defendant into a false sense of security, giving him no reason even to suspect' that he might be subject to the

statutory prohibition." *Elections Board*, 227 Wis. 2d at 680 (quoting *Bouie*, 378 U.S. at 352).

The underlying prosecution in this case violates the due process clause in a multitude of ways. The court of appeals' approval of the prosecution's theory opens the floodgates for wholesale and selective prosecution of government employees and officials. The reliance on employee handbooks and similar sources as the legal standard raises a myriad of problems. Does the employee have adequate notice of the rules? Do conflicts exist between the varied rules and directions and handbooks, policy manuals and memos and what is customary office practice? What differentiates or identifies (besides supervisory and prosecutorial discretion) rule violations that constitute criminal conduct and those which do not? Can a work rule written decades after the passage of a criminal statute be used to define an element of the statute? No matter how the due process issue is characterized, the state's application of section 946.12(3), to the circumstances in this case fails all standards.

G. *State v. Tronca* Is Not Controlling.

Petitioners acknowledge that in one of the few cases interpreting section 946.12(3), *State v. Tronca*, 84 Wis. 2d 68, 267 N.W.2d 216 (1978), this Court ruled that subsection (3) was not unconstitutionally void for

vagueness or overbreadth. However, the constitutional challenge in that case went to vagueness of the term "discretionary power," not to the element requiring proof that the charged conduct was inconsistent with some undefined "duty." *Tronca* arose from misconduct of an alderman who, when exercising his discretionary powers to vote one way or another, only voted on liquor license applications when the applicants had paid substantial monies to a third party.

In determining that section 946.12(3) was not unconstitutionally vague, the *Tronca* court stated that the statute "clearly gives notice of the nature of the penalties and the applicability of the statute to *the conduct engaged in by each of the defendants.*" *Tronca*, 84 Wis. 2d at 87 (emphasis added). The court's specific reference to the conduct of the defendants in that case, as opposed to the plain language of that statute itself, confirms that the court's decision was rooted in the specific fact situation before it -- an alderman whose discretionary power to vote on liquor licenses was depended on whether his associate was paid thousands of dollars in cash.

Moreover, immediately following this conclusion, the *Tronca* court stated that the defendants could not claim a lack of notice because, based on the record, they were "well aware of the criminality" of their conduct. *Id.* The court specifically cited the alderman's "umbrage" at what he

thought to be a direct bribe for his vote and his insistence that the payment be delivered to a third party. *Id.* The court added that there was no suggestion that the defendants did not understand the basic illegality of the entire transaction, and their conduct was "so clearly within the proscription of the statute that any reasonable person would know that it was prohibited." *Id.* at 87-88. In other words, any fool should know that a politician who acts favorably on a matter before him or her in exchange for a bribe has violated section 946.12(3).

II. THE COURT OF APPEALS' RELIANCE ON THE TERMS "CAMPAIGN-RELATED" AND "POLITICAL" IN ATTEMPTING TO DEFINE THE TERM "DUTIES" IN SECTION 946.12(3), *STATS.*, DEMONSTRATES THE AMBIGUITY AND VAGUENESS OF "DUTIES" UNDER THE PARTICULAR FACTS OF THIS CASE.

A. Political Activity Versus Legislative Activity.

The issue of vagueness and the statute's underlying ambiguity operates at two separate levels. The first level relates to the lack of a definition in the statute of the phrase "inconsistent with the duties" of the public official or employee. The second level relates to the terms used by the state and the court of appeals to define those duties, *i.e.*, the prohibitory duty to avoid political activity and campaign-related activity. The obvious question that immediately arises is how can a legislator be

prevented from engaging in political activity while functioning in a legislative capacity?

There are no statutes, rules or regulations that define or differentiate political or campaign-related activity. As discussed above, both Black's Law Dictionary and American Heritage Dictionary define "political" and "politics" as relating to the affairs of government and the administration of the state. Simply put, political activity and politics are what makes state government run.

The lack of statutory guidance and legal standards for resolving the interrelationships and non-divisibility of political activity, campaign activity, and legislative activity was at issue in *People v. Ohrenstein*, 77 N.Y. 2d 38, 563 N.Y.S. 2d 744, 565 N.E.2d 493 (1990), *aff'g* 549 N.Y.S. 2d 962 (App. Div. 1989). The *Ohrenstein* court held that the minority leader of the state senate could not be prosecuted on charges of theft or filing false documents relating to salaries for legislative aides hired to work exclusively on campaigns, or for that matter for hiring and paying individuals with state funds for working solely on partisan campaigns.

The *Ohrenstein* prosecution rested "on a single prosecutorial premise: political campaign activities were not a 'proper duty' of a legislative staff member." *Ohrenstein*, 77 N.Y. 2d at 45. The prosecution

also urged "that a Senator's power to assign duties to legislative assistants should be limited to governmental activities and should not include purely political ones." *Id.* at 47. The court disagreed that the law criminally prohibited a legislator from assigning campaign work to an aide. "Although this distinction may be relevant to other State employees, the line between political and governmental activities is not so easily drawn in cases dealing with legislators and their assistants." *Id.* Political activities, as opposed to governmental activities, "are considered an inherent part of the job of an elected representative and thus perfectly legitimate acts for a legislator or legislative assistant to perform . . . ." *Id.* (citation omitted).

Since the beginning of legislative bodies, legislators and their aides have engaged in political activities during normal business hours. As noted in *Ohrenstein*: "The Legislature is the 'political' branch of government." *Id.* at 47.

B. Defining The Term "Duties" And What Constitutes Legislative Activity Is A Political Question Committed To The Legislature.

Under the Separation of Powers Doctrine, it is crucial to determine whether the case presents a "political question" committed by the constitution to another branch of government. One of the six alternative factors to be considered in determining whether an issue is a political

question and therefore not justiciable is whether there is "a lack of judicially discoverable and manageable standards for resolving the issue." *Baker v. Carr*, 369 U.S. 186, 217 (1961). The parameters of this factor, although not identical, are closely aligned to that prong of the vagueness test, which prohibits subjective creation of standards for culpability.

The intermediate appellate court in *Ohrenstein* determined that the legislature's failure to promulgate "appropriate standards governing the duties and assignments of its employees, a matter within its sphere of authority, does not entitle another branch of government, 'to fill the vacuum and impose a solution of its own . . . .'" *Ohrenstein*, 549 N.Y.S. 2d at 976. To fill the vacuum would require a policy determination "not suited for judicial discretion" as to what political activities may, or may not, be engaged in by legislative employees. *Id.* In effect, it ruled that courts are barred from attempting to distinguish a legislative employee's "legislative" work from allegedly "political" work because "it constitutes an inappropriate attempt by the People to regulate the internal affairs of the Legislature and deals with non-justiciable questions." *Id.* at 978.

Federal cases attempting to draw the line between legislative duties and partisan work are also in accord with petitioners' position. *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1375 (D.C. Cir. 1981), involved

a *qui tam* action alleging that a senator had paid a staffer to perform work purportedly within his "official legislative and representational duties" when in fact the staffer worked "extensively and exclusively for the Senator's reelection." The *Cannon* court explained that determining what constitutes "official" duties was a "perplexing question" and that not even the U.S. Senate "had been able to reach a consensus on the propriety of using staff members in reelection campaigns . . . ." *Id.* at 1380 (footnotes omitted). The court characterized the history of those attempts as revealing the "lack of a firm standard" and "vividly portray[ing] the keen difficulties with which courts would be faced were they to attempt to design guidelines on their own." *Id.*

Concluding no decision or ruling guided its inquiry, the *Cannon* court held that there were no "manageable standards" to apply and added:

> . . . the inability of the Senate -- a body constitutionally authorized and institutionally equipped to formulate national policies and internal rules of conduct -- to solve the problem demonstrates "the impossibility of deciding" the issue appellant poses "without an initial policy determination of a kind clearly for nonjudicial discretion."

Id. at 1383-84.

In *Winpisinger v. Watson,* 628 F.2d 133, 136 (D.C. Cir. 1980), members of President Carter's cabinet where alleged to have improperly used federal resources to support the Carter-Mondale Committee. Dismissing

the claim, the court held the necessary inquiry "would require the court to determine whether executive actions were motivated by a genuine concern for the public interest or by 'political expediency,'" a determination that *"would impermissibly intrude the judiciary into the affairs of a coordinate branch of government."* *Winpisinger*, 628 F.2d at 136.

Nothing in Chapters 11, 12 and 19 prohibits using state resources or state time for partisan purposes, nor do these Chapters distinguish between a legislator's "official" work versus "political" or partisan work. Because Wisconsin law has established no "judicially discoverable and manageable standard" for distinguishing between "official" and "political" or other partisan work, the issue is a non-justiciable political question.

III. THE COURT OF APPEALS' NOVEL DEFINITION OF "DUTIES" CLEARLY IMPLICATES ACTIVITY PROTECTED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION; THEREFORE, THE STATUTE IS BOTH VAGUE AS APPLIED TO THESE FACTS AND OVERBROAD.

Like students and teachers at the schoolhouse gate, elected officials and their aides "do not shed their constitutional rights to freedom of speech or expression" at the Capitol door. *See Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969). As the Supreme Court recognized almost forty years ago, "[t]he manifest function

of the First Amendment in a representative government requires that Legislators be given the widest latitude to express their views on issues of policy." *Bond v. Floyd,* 385 U.S. 116, 135-6 (1966). In terms of campaign-related activity, specifically under the question of campaign contributions and fundraising, it is well established that "[a]dvocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally . . . ." *Buckley v. Valeo,* 424 U.S.1, 48 (1976).

Speech and assembly are fundamental components of the intertwined legislative and political processes involved in the public offices held by petitioners. The court of appeals' interpretation of section 946.12(3) as prohibiting political activity and campaign activity will have a chilling effect on the ability of legislators and staffers to perform their legislative duties -- whatever those duties may be. The fear that any conversation or correspondence exchanged with a constituent might later be construed as "politics" or "campaigning" would stifle the legislative process. Such an application of the statute would infringe upon the rights not only of the legislators and staffers, but also of their constituents -- the citizens who elected them -- to communicate freely regarding existing, pending and proposed legislation.

These First Amendment values are protected by the constitutional doctrines of vagueness and overbreadth. Often overlooked, vague laws offend a value in addition to the principal of "fair warning" and "arbitrary and subjective standards for enforcement." The Supreme Court has stated, " . . . where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.'" *Grayned,* 408 U.S. at 109 (citations omitted). LaFave has characterized this principle in the vagueness context as "breathing space for First Amendment rights." 1 LaFave, *supra,* § 2.3(d) at 151. He observed:

> [I]t is for this reason that the United States Supreme Court has repeatedly applied strict standards of permissible statutory vagueness to legislation to the area in First Amendment rights. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

Id. at 152 (quoted sources omitted).

Related, but not identical, is the direct attack on the statute applying the constitutional doctrine of overbreadth. The overbreadth doctrine protects against the inherent dangers of selective enforcement that would allow "practically unbridled administrative and prosecutorial discretion that may result in selective prosecution based on certain views deemed objectionable by law enforcement." *State v. Stevenson,* 2000 WI 71, ¶13, 236

Wis. 2d 86, 93, 613 N.W.2d 90. First Amendment concerns are so important that individuals challenging a statute may pose hypothetical situations apart from their own in order to invalidate the statute. *Id.* at ¶¶12-14, 236 Wis. 2d at 92-94.

In their brief to the court of appeals, petitioners presented a hypothetical scenario which highlight these concerns.

> Assume that a bill is pending related to campaign finance reform. Legislator A and his party seek to eliminate all PAC money. Legislator A believes that the campaign finance report of Legislator B, a member of another political party who opposes the bill, would disclose Legislator B's heavy reliance on PAC money. Legislator A wants to disclose that report in order to demonstrate why the reform bill should be passed.
>
> Legislator A assigns to his aide the task of obtaining a copy of Legislator B's report and disseminating it to other supporters of the bill. With Legislator A's consent, the aide accomplishes this task during normal business hours. Armed with the report, the members of Legislator A's party not only challenge the pending bill, but also, because the report was disclosed during the public debate, use it as the focal point for the candidate challenging Legislator B's reelection bid.
>
> Legislator A and his aide clearly have a legitimate reason and purpose for obtaining the report and disseminating it on state time -- doing so furthers the goals and purposes of Legislator A's constituents and his party. Legislator B's receipt of PAC money is a legitimate matter for debate in the context of the proposed legislation. Does the fact that the report served the legislative purpose of promoting the bill and the campaign purpose of opposing Legislator B's reelection subject them to prosecution?

As this scenario makes abundantly clear, it is often virtually impossible to distinguish between legislative activities and campaign activities. Something as simple as returning the phone call of a constituent who has a question on the legislator's position on an issue could be construed as political activity. After all, a happy constituent who remembered that he was treated well and communicated his positive experience to his friends may result in a greater advantage or benefit to a successful political campaign than dozens of television commercials.

Whether the First Amendment rights impacted by this case are protected by the vagueness doctrine or the overbreadth doctrine, one thing is abundantly clear. The state's ability to justify this prosecution becomes even more transparent. Whether it is a stricter standard of permissible statutory vagueness or because the "burden shifts to the government to prove beyond a reasonable doubt that the statute passes constitutional muster [,]" *id.* at ¶10, the state should not be allowed to pursue a prosecution that denies petitioners their First Amendment rights.

IV. THE SEPARATION OF POWERS DOCTRINE PRECLUDES THIS PROSECUTION.

Implicit in the division of governmental powers among the judicial, legislative, and executive branches is the doctrine of separation of powers. *State v. Horn*, 226 Wis. 2d 637, 643, 594 N.W.2d 772 (1999). The three

branches of state government are prohibited from intruding into the zones of authority constitutionally established for any other branch, and "*any* exercise of authority by another branch of government is unconstitutional." *State ex rel. Fiedler v. Wisconsin Senate,* 155 Wis. 2d 94, 100, 454 N.W.2d 770 (1990). In effect, there are "core" powers reserved to each branch of government upon which the other two branches may not intrude. There are also "shared" powers upon which one branch of government may not unduly burden or substantially interfere with the other. *Panzer v. Doyle,* 2004 WI 52, ¶50-51, ___ Wis. 2d ___, 680 N.W.2d 666. Defining the duties of legislative leaders and their employees is a core function of the legislature. Even if it is not, the state's methodology and creation of the definition of duties for application of section 946.12(3) in this case, substantially interferes with legislative powers.

A. The Legislature Has Exclusive Authority To Establish The Duties Of Its Members.

In examining those governmental powers allocated to the legislative branch, it is important to recognize that the power of the legislature is plenary; that is, practically absolute. *State ex rel. McCormack,* 18 Wis. 2d at 277-79. Against this backdrop, the legislature is further empowered by Article IV, section 8 of the Wisconsin Constitution, which provides that the Assembly "may determine the rules of its own proceedings, punish for

contempt and disorderly behavior, and with the concurrence of two-thirds of all the members elected, expel a member; but no member shall be expelled a second time for the same cause." Pursuant to these powers, the Assembly passed and approved Assembly Rules, including Rule 2 defining the duties of party officers and Rule 3 defining the duties of the Speaker of the Assembly. At all times pertinent to the allegations in the complaint, Jensen was Speaker of the Assembly and Foti was Majority Leader. In addition, custom, historical development and day-to-day political realities have further contributed to the duties of the leaders of the legislature.

Historically, Wisconsin courts have been adverse and reluctant to intrude upon the legislature's power to govern itself. In *State ex rel LaFollette v. Stitt,* 114 Wis. 2d 358, 367, 338 N.W.2d 684 (1983), the court reaffirmed that it would "not interfere with the conduct of legislative affairs in the absence of a constitutional mandate to do so or unless either its procedures or end result constitutes a deprivation of constitutionally guaranteed rights." (Citing *Outagamie County v. Smith,* 38 Wis. 2d 24, 41, 155 N.W.2d 639 (1968)).

In this prosecution, the state is asking the judicial branch to impinge upon Jensen and Foti's hiring, retention, and supervision of state

employees, the nature of the duties those employees were expected to fulfill, and did fulfill, and whether Jensen and Foti's actions were consistent with their legislative duties. This evaluation is constitutionally off limits for the same reason that it would be inappropriate for the executive branch to define the duties of the judiciary. The inherent nature of the legislative process intertwines legislative, political, and campaign considerations -- however those individual components are defined.

B. What Constitutes The Duties Of Legislators And Aides Is A Nonjusticiable "Political Question."

As discussed earlier, essential to an analysis under the separation of powers doctrine is whether the case presents a "political question" committed by the Constitution to another branch of the government. In *Baker,* the United States Supreme Court established six alternative factors to be considered in determining whether an issue is a "political question" and therefore nonjusticiable:

1. A textually demonstrable constitutional commitment of the issue to a coordinate political department; *or*

2. A lack of judicially discoverable and manageable standards for resolving the issue; *or*

3. The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; *or*

4. The impossibility of a court's undertaking independent resolution without expressing lack of the respect due a coordinate branch of government; *or*

5. An unusual need for unquestioning adherence to a political decision already made; *or*

6. The potentiality of embarrassment from multifarious pronouncements by various departments on the question.

Baker, 369 U.S. at 217. If the court finds any *one* of these factors, the issue is nonjusticiable. *Id.*

The second factor, the lack of judicially manageable standards, was discussed in Argument II. As to the first factor, Article IV, section 8 of the Wisconsin Constitution and the plenary power of the legislature unequivocally commit the power to make its own rules and define the duties of its members to the legislature.

Petitioners' argument that the separation of powers doctrine precludes the state's prosecution is not intended in anyway to suggest that legislators generally are not subject to prosecution under the Wisconsin Criminal Code. Clearly, they, like all other citizens of this state, must obey the law or face prosecution. The problem with this particular prosecution, however, is that both the elements of section 946.12(3), *Stats.*, and the allegations contained in the criminal complaint involve solely the

performance by a legislator or legislative aide of his or her duties, which are not defined anywhere.

It is axiomatic that the executive branch, and especially a local prosecutor, cannot create or mandate the duties of a legislator or aide any more than a prosecutor could mandate or create the duties of a judge. Similarly, a judge cannot create or mandate the duties of members of the executive or legislative branches of government.

This prosecution relies upon the courts' and prosecutor's convoluted construction of statutes, committee reports, emails and a handbook in order to define the duties of members of the legislative branch. Such action impermissibly crosses the line into matters constitutionally committed to the legislature. The separation of powers precludes any prosecution of petitioners or alleged violations of section 946.12(3), *Stats.*

CONCLUSION

For all the forgoing reasons, defendants-appellants-petitioners Jensen, Foti and Schultz urge this Court to reverse the court of appeals and remand this case to the circuit court ordering a dismissal of the complaint.

Dated this 27th day of July, 2004.

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CERTIFICATION

I certify that this brief conforms to the rules contained in section 809.19(8)(b) for a document produced with a proportional serif font. This document contains 9,820 words.

STEPHEN L. MORGAN

APPENDIX

PAGE

2004 WI App 89

COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0106-CR

Cir. Ct. Nos. 02CF002453
02CF002454
02CF002455

STATE OF WISCONSIN

IN COURT OF APPEALS

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT R. JENSEN, STEVEN M. FOTI,
AND SHERRY L. SCHULTZ,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

Before Vergeront, Higginbotham and Anderson, JJ.

¶1 HIGGINBOTHAM, J. Scott R. Jensen, Steven M. Foti and Sherry L. Schultz appeal a circuit court order denying their motion to dismiss the forty-seven-page criminal complaint filed against them. Jensen, a member of the Wisconsin State

Assembly and former Speaker of the Assembly, is charged with three counts of felony Misconduct in Public Office as a party to a crime, in violation of WIS. STAT. §§ 939.05 (2001-02)[1] and 946.12(3)[2] and one misdemeanor count of Intentional Misuse of Public Positions for Private Benefit as a party to a crime, in violation of WIS. STAT. §§ 939.05[3], 19.45(2) and 19.58(1). Foti, also a member of the Wisconsin State Assembly and Majority Leader of the Assembly, is charged with one count of felony Misconduct in Public Office as a party to a crime, in violation of §§ 939.05 and 946.12(3). Schultz, a former employee of the State of Wisconsin in Foti's Assembly office, has been charged with one count of felony Misconduct in Public Office as a party to a crime, in violation of §§ 939.05 and 946.12(3).

¶2 Jensen, Foti and Schultz (the defendants) collectively argue that WIS. STAT. § 946.12(3) is unconstitutionally vague and overbroad as applied to them. The defendants also assert that the State's attempted definition of legislative duties constitutes

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[1] All references to the Wisconsin Statutes are to the 2001-2002 version unless otherwise noted.

[2] WISCONSIN. STAT. § 946.12 provides, in relevant part:

> Any public officer ... who does any of the following is guilty of a Class I felony:
>
> ....
>
> (3) Whether by act of commission or omission, in the officer's ... capacity as such officer ... exercises a discretionary power in a manner inconsistent with the duties of the officer's ... office ... or the rights of others and with intent to obtain a dishonest advantage for the officer ... or another ....

[3] WISCONSIN. STAT. § 939.05 states:

> (1) Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act.

a violation of the separation of powers doctrine. Finally, the defendants contend that the factual allegations of the complaint are insufficient to sustain probable cause. We recently addressed and rejected nearly identical arguments in ***State v. Chvala***, 2004 WI App 53, ___ Wis. 2d ___, 678 N.W.2d 880. We reject them again here and affirm the order of the circuit court.

FACTS

¶3 Jensen, a Republican, was elected to the Wisconsin State Assembly in a January 1992 special election and has been re-elected to two-year terms of office since November 1992.[4] Jensen became Speaker of the Assembly on November 4, 1997. Campaign finance records filed with the State Elections Board indicate that since 1997, Jensen has used his campaign committee, Taxpayers for Jensen, to raise money for his campaigns for political office.

¶4 Foti, also a Republican, was first elected to the Assembly in 1982 and has been re-elected to two-year terms of office since then. Foti has been Majority Leader of the Assembly since 1997. Schultz was a full-time state employee from January 27, 1998 until October 8, 2001, hired by Foti to work at his Capitol office.

¶5 The legislature created partisan caucuses in the 1960s, pursuant to WIS. STAT. § 13.20, and employed staff to further the purposes of the caucuses. According to Charles Sanders, Chief Clerk of the Wisconsin Assembly from 1971 until January 4, 2001, these partisan caucuses were created to assist legislators with speech writing, letter writing, bill drafting and other services to support legislators because, at the time the partisan caucuses were created, legislators did not have their own staff. The mission of

[4] All factual references derive from the criminal complaint. For the purposes of this opinion only we accept all allegations as true.

the partisan caucuses was to assist legislators in administration, political and legislative research, policy analysis, examination of committee activities and constituent communication. One of the four authorized partisan caucuses was the Assembly Republican Caucus (ARC). The director of the ARC reported directly to the Assembly Speaker.

¶6 WISCONSIN STAT. § 11.265 authorizes the creation and operation of Legislative Campaign Committees (LCCs) for each party in the two legislative houses. LCCs solicit and distribute political contributions for candidates of a political party for legislative office. LCCs are governed by WIS. STAT. ch. 11. The Republican Assembly Campaign Committee (RACC) was an LCC.

¶7 On October 18, 2002, following an eighteen-month John Doe investigation, the State issued a forty-seven-page criminal complaint against the defendants. The criminal complaint alleges that both Jensen and Foti, in their capacities as public officers, exercised their discretionary powers in manners inconsistent with their duties by hiring, retaining and supervising Schultz to solicit, account for, distribute and publicly report money for political campaigns and assist others in those same tasks during times when Schultz was compensated as a state employee or using state resources or both.

¶8 The complaint further alleges that Jensen intentionally hired, retained and supervised Ray Carey and Jason Kratochwill, state employees, to recruit and otherwise directly assist candidates for political office as candidates. Carey and Kratochwill were compensated as state employees using state resources or both. The complaint also alleges that Jensen, with the intent to obtain a dishonest advantage for Taxpayers for Jensen, intentionally retained and supervised state employees to work for Taxpayers for Jensen during times when the employees were compensated as state employees or using state resources or both. Finally, the complaint alleges that Schultz exercised her discretionary

powers inconsistent with the duties of her employment, with the intent to obtain a dishonest advantage for others, by soliciting, accounting for, distributing and publicly reporting money for political campaigns, and assisting others in those same tasks, during times when she was compensated as a state employee or using state resources or both. The particulars of each count charged will be discussed later in this opinion.

¶9 On December 13, 2002, the defendants moved to dismiss the criminal complaint on various grounds. On December 20, 2002, the defendants filed additional motions and supporting documents, including motions to dismiss for lack of probable cause, a motion to dismiss for violation of the separation of powers doctrine, a motion to strike and a motion for disclosure/supplemental to the previously filed motion for relief from secrecy order.

¶10 After oral argument the circuit court denied all the defendants' motions and the motion for a stay pending appeal. The defendants were bound over for trial following a preliminary hearing. We granted the defendants' petition for leave to appeal and certified the issues in a petition to the Wisconsin Supreme Court. The Supreme Court denied the petition. On March 31, 2003, the circuit court suspended the criminal proceedings pending our determination in this case. The defendants appeal the circuit court's denial of their motions to dismiss.

DISCUSSION

Vagueness

¶11 The defendants maintain that WIS. STAT. § 946.12(3) is unconstitutionally vague as applied to the facts of this case. The defendants contend that § 946.12(3) does not provide adequate notice because the conduct alleged in the criminal complaint is not clearly and unequivocally prohibited by § 946.12(3). Specifically, the defendants argue

that neither the complaint nor § 946.12(3) adequately delineates the duty each defendant allegedly violated. The defendants also maintain that the vagueness of § 946.12(3) authorizes prosecutors to apply or create their own subjective theories, standards and interpretations of the statute. As we concluded in ***Chvala***, ___ Wis. 2d ___, ¶¶7-21, these arguments are entirely without merit.[5]

¶12 We review the constitutionality of statutes de novo. ***State v. Bertrand***, 162 Wis. 2d 411, 415, 469 N.W.2d 873 (Ct. App. 1991). Statutes are presumed constitutional and we review them to preserve their constitutionality. ***Id.*** A party challenging the constitutionality of a statute must demonstrate that it is unconstitutional beyond a reasonable doubt. ***State v. Pittman***, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993).

¶13 Whether a statute is unconstitutionally vague is a question of law. ***Id.*** A vagueness challenge must satisfy a two-prong test:

> The first prong of the vagueness test is concerned with whether the statute sufficiently warns persons 'wishing to obey the law that [their] ... conduct comes near the proscribed area.' The second prong is concerned with whether those who must enforce and apply the law may do so without creating or applying their own standards.

Id. (citations omitted). A statute is not unconstitutionally vague "simply because in some particular instance some type of conduct may create a question about its impact under the statute." ***State v. Smith***, 215 Wis. 2d 84, 91-92, 572 N.W.2d 496 (Ct. App. 1997) (citation omitted).

> The ambiguity must be such that 'one bent on obedience may not discern when the region of proscribed conduct is neared, or such

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[5] As in ***State v. Chvala***, 2004 WI App 53, ___ Wis. 2d ___, 678 N.W.2d 880, the State first argues Jensen, Foti and Schultz lack standing to challenge WIS. STAT. § 946.12(3) on vagueness grounds because they were aware of the criminality of their conduct and the consequences. *See* ***State v. Tronca***, 84 Wis. 2d 68, 87, 267 N.W.2d 216 (1978). Because we conclude § 946.12(3) is unconstitutionally vague on other grounds, we do not take up the issue of standing.

> that the trier of fact in ascertaining guilt or innocence is relegated to creating and applying its own standards of culpability rather than applying standards prescribed in the statute or rule.'

Pittman, 174 Wis. 2d at 277 (citation omitted). A person whose conduct intentionally comes close to "an area of proscribed conduct" assumes the risk that his or her conduct may fall into the area of proscribed conduct. ***State v. Courtney***, 74 Wis. 2d 705, 711, 247 N.W.2d 714 (1976) (citation omitted). A criminal statute is not vague if "by the ordinary process of construction, a practical or sensible meaning may be given to the ... [law]...." ***State v. Arnold***, 217 Wis. 340, 345, 258 N.W. 843 (1935).

¶14 Applying the ***Pittman*** test, we first determine whether WIS. STAT. § 946.12(3) sufficiently warns Jensen and Foti, as legislators, and all three defendants as reasonable persons wishing to obey the law, that his or her alleged conduct approaches the proscribed activity. Section 946.12(3) prohibits the exercise of a discretionary power in a manner inconsistent with the duties of an officer's office. The existence of a duty is a question of law. ***State v. Schwarze***, 120 Wis. 2d 453, 456, 355 N.W.2d 842 (Ct. App. 1984).

¶15 The defendants make four arguments in support of their contention that WIS. STAT. § 946.12(3) does not clearly proscribe the conduct as alleged against them. First, the Legislature did not intend to have the prohibitions provided in WIS. STAT. chs. 11, 12 and 19 serve as the basis for prosecution under § 946.12(3). Second, neither § 946.12(3) nor chs. 11, 12 or 19 specifically define the duties of legislators and legislative aides. Third, the State cannot point to any case holding that chs. 11, 12 and 19 provide the requisite notice that any violation thereof violates § 946.12(3). Fourth, the criminal complaint does not allege that the defendants violated any statute contained in chs. 11, 12 and 19 nor does it allege the existence of any "duty" derived from these chapters. Rather, the defendants argue, the complaint refers only to an Assembly Clerk

report, an Ethics Board opinion and some e-mails as establishing the duty that was allegedly violated. Therefore, the defendants assert, the alleged conduct is not prohibited by § 946.12(3).

¶16 We agree that one source of the defendants' duties is the Assembly Rules. We disagree, however, that the Rules constitute the only source from which defendants' duties may be ascertained. The defendants' arguments stand on one basic contention: their duties as legislators and as a legislative aide must be specified in a particular statute before any violation thereof can serve as a basis for prosecution under WIS. STAT. § 946.12(3). As we concluded in ***Chvala***, ___ Wis. 2d ___, ¶¶13-21, these arguments are without merit.

¶17 The defendants cite no authority for the proposition that we are restricted to an exclusive statute or one exclusive source to ascertain his or her duty. The duty under WIS. STAT. § 946.12(1) "may be imposed by common law, statute, municipal ordinance, administrative regulation, and perhaps other sources...." *Judiciary Committee Report on the Criminal Code*, Wisconsin Legislative Council 1953, p. 176. While this report explicitly references § 946.12(1), in ***Chvala*** we extended this logic to § 946.12(3) and concluded that a legislator's duty under § 946.12(3) may be ascertained by reference to an assortment of sources. ***Chvala***, ___ Wis. 2d ___, ¶13.

¶18 In this case, the assortment of sources includes applicable statutes, legislative rules and guidelines and the Assembly Employe Handbook. *See* ***State v. Tronca***, 84 Wis. 2d 68, 80, 267 N.W.2d 216 (1978) ("the powers of a public official ... are not limited to expressly conferred powers but apply to *de facto* powers which arise by custom and usage ...."); *see also* ***Chvala***, ___ Wis. 2d ___, ¶13. We now address the scope of the defendants' duties as legislators and state employees.

¶19 The general duty of a legislator is to determine "policies and programs and review ... program performance for programs previously authorized ...." WIS. STAT. § 15.001(1). We next explore other sources for the defendants' duties in light of this general pronouncement.

¶20 WISCONSIN STAT. ch. 19 addresses "General Duties of Public Officials" and contains a subchapter entitled "Code of Ethics for Public Officials and Employees." WISCONSIN STAT. § 19.45, contained within this Code of Ethics, states, in relevant part,

> (2) No state public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated.

Furthermore, WIS. STAT. § 19.46 states, in relevant part,

> (1) ... no state public official may:
>
> ....
>
> (b) Use his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official ... or an organization with which the official is associated.

Under these statutes, both Jensen and Foti had a duty to avoid using their offices to assist private political campaigns and organizations including but not limited to organizations such as Taxpayers for Jensen and the RACC.

¶21 In addition, WIS. STAT. § 11.001(2) prohibits an incumbent from obtaining an unfair advantage over a non-incumbent:

> This chapter is also intended to ensure fair and impartial elections by precluding officeholders from utilizing the perquisites of office at public expense in order to gain an advantage over nonincumbent candidates who have no perquisites available to them.

Under this statute, Jensen and Foti had a duty to avoid using the perquisites of office at public expense in order to gain an advantage over nonincumbent candidates in their own campaigns and the campaigns of other candidates.

¶22 Other statutes delineate the defendants' duties. WISCONSIN STAT. § 12.07(3) expressly prohibits employers and others from requiring anyone to do campaign work as a condition of employment. Jensen and Foti are alleged to have hired Schultz for the sole purpose of performing campaign fundraising. Although Schultz on the rare occasion answered telephone calls to the ARC unrelated to campaigns, Jensen and Foti hired her to raise campaign funds, not perform legitimate ARC services.

¶23 WISCONSIN STAT. § 11.36 specifically prohibits public officials from soliciting or receiving contributions or services while engaged in their official duties and also requires officials supervising a particular office on state property to prohibit others from entering the office for the purpose of making or receiving campaign contributions. The complaint alleges Jensen and Foti hired and supervised Schultz to use their offices in the Capitol annex and at the ARC to conduct campaign fundraising. The complaint further alleges lobbyists delivered campaign contribution checks to Foti's Capitol office. Jensen is alleged to have made numerous fundraising calls from his office and to have brought in campaign checks for his staff, including Schultz, to enter into a campaign database. The defendants clearly had a duty to refrain from this type of conduct.

¶24 The Assembly's own policy guidelines, which John Scocos, Assembly Chief Clerk, considers to be Assembly Rules, are consistent with these statutes and prohibit any political activity during working hours with state-owned facilities and equipment. The Assembly Employe Handbook was introduced into evidence at the preliminary hearing and states, in part,

> Political activity is not permitted during working hours. State owned facilities, office equipment, supplies, etc., may not be used for political purposes anytime. Citizenship rights to political activity and community involvement must be exercised on non-office time.

¶25 As did Chvala, the defendants argue that the term "political activity," as used in the Assembly Employe Handbook, does not include political campaign activity. It is unreasonable to equate "political activity" with "legislative activity." *See Chvala*, ___ Wis. 2d ___, ¶16. Rather, it is apparent from the context in which these words are used that the Assembly Employe Handbook restricts the precise type of activity alleged in this case: political campaigning with public resources. The Assembly's own rules prohibit the type of conduct in which the defendants allegedly engaged.

¶26 In addition to the allegation of the standing prohibition on political activity on state time with state resources contained in the Assembly Employe Handbook, the criminal complaint alleges that on February 27, 1997, an e-mail was sent to all Assembly members from Representative Ben Brancel, then speaker of the Assembly, which stated

> An e-mail message of a political nature was inadvertently sent by a new Assembly employee today.
>
> This serves as a reminder to all Legislative staff that political activity, whether partisan or non-partisan is not permitted during working hours. Furthermore, all state owned facilities, office equipment, including the electronic mail system, and all other state owned supplies and materials are **strictly prohibited** from use for a political purpose anytime. This means both use during and after business hours.
>
> Citizenship rights to political activity and community involvement must be exercised on non-office time and equipment.

¶27 Legislators were given similar notice in a May 16, 2000, memo addressed to "Legislators and Staff," from Charlie Sanders, Chief Assembly Clerk:

> Political activity is not permitted during working hours. State owned facilities, office equipment, supplies, etc., may not be used for political purposes anytime. Citizenship rights to political

> activity and community involvement must be exercised on non-office time.

Sanders sent a similar e-mail every election year regarding this prohibition.

¶28 The Wisconsin Ethics Board issued an advisory opinion in 1978 stating in part

> A legislative employee should not engage in campaign activities (a) with the use of the state's facilities, supplies, or services not generally available to all citizens; (b) during working hours for which he or she is compensated for services to the State of Wisconsin, or at his or her office in the Capitol regardless whether the activity takes place during regular working hours.

Ethics Board 138, July 27, 1978. These cautionary warnings are substantially the same as the prohibition expressed in the Assembly Employe Handbook. Clearly Jensen, Foti and Schultz had adequate notice of their duty to refrain from engaging or directing legislative and caucus staffers from engaging in campaign-related activity while using state resources and state time.

¶29 The defendants' duties are sufficiently delineated in the Assembly Employe Handbook, the e-mail from Representative Brancel, the memo from Charlie Sanders, the Ethics Board 1978 advisory opinion and WIS. STAT. §§ 11.001(2), 11.36, 12.07(3), 19.45 and 19.46 such that a reasonable person would be aware that using discretionary powers to obtain a dishonest advantage over others by waging partisan political campaigns with state resources on state time violates one's duty as a public official. We conclude that the defendants have not satisfied the first criteria of ***Pittman,*** whether the statute sufficiently warns a person wishing to obey the law that their conduct comes near the proscribed area, because Jensen and Foti had sufficient notice that hiring and directing ARC staffers to work on political campaigns on state time with state resources violated their duties as public officials and therefore violated WIS. STAT. § 946.12(3), and Schultz had sufficient

notice that political campaign fundraising on state time with state resources violated her duty in violation of § 946.12(3).

¶30 The second prong of the ***Pittman*** test for vagueness, whether those who must enforce and apply the law may do so without creating or applying his or her own standards, is also unsatisfied.[6] The defendants argue they were not aware they could face felony prosecution for engaging in campaign-related activities on state time with state resources. As we said in ***Chvala***, ___ Wis. 2d ___, ¶17, it is irrelevant that the defendants were unaware they could be prosecuted for violating WIS. STAT. § 946.12(3). The vagueness challenge is based upon what a reasonable person who is intent on obeying the law can be expected to understand of the law's prohibitions. Ignorance of the law is no defense. ***State v. Collova***, 79 Wis. 2d 473, 488, 255 N.W.2d 581 (1977).

¶31 The defendants attempt to justify their conduct by declaring that participation in political activities by a legislator and legislative aide is not inconsistent with legislative duties. They argue that the scope of WIS. STAT. § 946.12(3) does not extend to campaign finance or election laws. We agree that § 946.12(3) is not a campaign finance law or election law. The defendants fail to understand, however, that they are not being prosecuted for violating any campaign finance or election laws. Rather, they are facing prosecution for violating a criminal statute, namely § 946.12(3), which prohibits officials, such as the defendants, from violating their duty as public officials. In this case, those duties are found, in part, within the campaign finance and election law statutes.

[6] The defendants advance a "retroactive interpretation of criminal statutes" argument. This argument is simply another approach to the "lack of notice" argument. Therefore we do not separately address it.

¶32 Defendants Jensen and Foti argue that engaging in political activity on state time with state resources is actually consistent with their duties as Assembly leaders. They claim that part of their duties as Assembly leaders was to actively promote the election of "like-minded legislators" so as to advance their political legislative agenda. We soundly reject their argument. Jensen and Foti's duty is to determine "policies and programs and review ... program performance for programs previously authorized ...," WIS. STAT. § 15.001(1), and to effectuate this duty consistent with the Assembly's internal rules and the statutes. We can find no duty that allows Jensen and Foti to engage in political activity on state time with state resources.

¶33 However, a clear duty has been established prohibiting the defendants from engaging in the conduct alleged in the complaint. The standards are clear for those who enforce and apply WIS. STAT. § 946.12(3). The defendants' duty as legislators and state employees is to refrain from directing state employees to manage political campaigns and to engage in political activity. This standard is unambiguous and can be handily applied. Section § 946.12(3) is not unconstitutionally vague as applied to this case.

Overbreadth

¶34 The defendants next argue that WIS. STAT. § 946.12(3) is unconstitutionally overbroad because it purports to criminalize legitimate legislative activity: ensuring the passage of legislation supported by the legislators' constituents by encouraging and supporting the candidacy and election of like-minded persons. Similar to the contentions made in ***Chvala***, ___ Wis. 2d ___, ¶¶22-28, this argument fails. To suggest that the activities alleged in the complaint — encouraging and in fact requiring state employees to work on private campaigns with state resources on state time — are legitimate legislative activities belies common sense. The charged violations of § 946.12(3) are reasonable and content-neutral restrictions.

¶35 An overbreadth challenge to a statute invokes the protections of the First Amendment to the United States Constitution. *See generally* ***State v. Stevenson***, 2000 WI 71, 236 Wis. 2d 86, 613 N.W.2d 90. Invalidation of a statute on overbreadth grounds is "strong medicine" that is "employed by the Court sparingly and only as a last resort." ***State v. Janssen***, 219 Wis. 2d 362, 373, 580 N.W.2d 260 (1998) (citation omitted). "A statute is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate." ***Id.*** at 374 (citation omitted). The overbreadth doctrine is grounded in the right to substantive due process and "has the effect of preventing the limiting, by indirection, of constitutional rights." ***Tronca***, 84 Wis. 2d at 89 (citation omitted).

¶36 WISCONSIN STAT. § 946.12(3) is aimed at specific conduct which, in this case, goes to the use of state resources in conducting political campaigns. Legislators or their employees are not prohibited from participating in political campaigns so long as they do not use state resources for that purpose. Moreover, legitimate legislative activity is not constrained by this statute. The line between "legislative activity" and "political activity" is sufficiently clear so as to prevent any confusion as to what conduct is prohibited under this statute. To the extent legitimate legislative speech is affected, it is purely secondary to the offensive conduct of campaigning on state time with state resources. *See* ***State v. Robins***, 2002 WI 65, ¶43, 253 Wis. 2d 298, 646 N.W.2d 287, cert. denied, 537 U.S. 103 (2002).

¶37 The defendants' overbreadth challenge centers on the following hypothetical:

> Assume that a bill is pending related to campaign finance reform. Legislator A and his party seek to eliminate all PAC money. Legislator A believes that the campaign finance report of Legislator B, a member of another political party who opposes the

> bill, would disclose Legislator B's heavy reliance on PAC money. Legislator A wants to disclose that report in order to demonstrate why the reform bill should be passed.
>
> Legislator A assigns to his aide the task of obtaining a copy of Legislator B's report and disseminating it to other supporters of the bill. With Legislator A's consent, the aide accomplishes this task during normal business hours. Armed with the report, the members of Legislator A's party not only challenge the pending bill, but also, because the report was disclosed during the public debate, use it as the focal point for the candidate challenging Legislative B's reelection bid.

¶38 This line of reasoning does not support the defendants' overbreadth assertions. The hypothetical is plainly not prohibited activity under WIS. STAT. § 946.12(3). The acquisition of the campaign finance report in the hypothetical was to challenge a pending bill, a clear legislative and non-campaign purpose. Here, on the other hand, the allegations are that the defendants had state employees use their publicly funded positions almost exclusively for campaign-related activities and fundraising. Legislators and reasonable persons should and would know the difference. In addition, the allegations before us speak of conduct which, on its face, cannot reasonably be construed as legitimate legislative activity. Such activity includes campaign fundraising, preparation and maintenance of campaign finance reports, candidate recruitment and campaign strategy development. Moreover, the Assembly Employe Handbook, the e-mail from former Assembly Speaker Brancel, the memo from Charlie Sanders and the Ethics Board advisory opinion provide unambiguous guidance as to when the lines between legislative activity and political activity are crossed. This hypothetical does not present any scenario under which an individual's fundamental right to free speech is encroached.

¶39 The defendants also suggest that contact between legislative aides and constituents could also fall under the rubric of WIS. STAT. § 946.12(3). We disagree. Constituent contact related to legitimate legislative business does not violate the

prohibitions of § 946.12(3), even if in doing so the aides hope that the positive contact will encourage future campaign contributions. Despite the defendants' arguments to the contrary, under no reasonable view is it "campaigning" to "return[] the phone call of a constituent who has a question on the legislator's opinion on an issue ...."

¶40 We are unable to envisage any state of affairs, based upon the suggestions proffered by the defendants, where a legislator or state employee could be prosecuted for engaging in legitimate legislative activity. WISCONSIN. STAT. § 946.12(3) would apply only if the defendants engaged in conduct involving the use of state resources on state time for activities falling outside legitimate legislative activity. We conclude § 946.12(3) is not overbroad.

Separation of Powers

¶41 The defendants next argue that the State's attempted definition of legislative duties constitutes a violation of the separation of powers doctrine. The defendants first contend that under WIS. CONST. art. IV, § 8, the Assembly has the exclusive power to regulate, police and discipline its own members. The defendants also claim that consideration of whether a particular activity is "legislative" or "political" is a non-justiciable "political question" and is therefore beyond the court's inquiry. We rejected virtually indistinguishable claims in ***Chvala***, ___ Wis. 2d ___, ¶¶42-77, and, for the same reasons, reject them here.

¶42 Whether a statute violates the doctrine of separation of powers presents a question of law. ***Barland v. Eau Claire County***, 216 Wis. 2d 560, 572, 575 N.W.2d 691 (1998). "The doctrine of separation of powers, while not explicitly set forth in the Wisconsin constitution, is implicit in the division of governmental powers among the judicial, legislative and executive branches." ***State ex rel. Friedrich v. Dane County Circuit Court***, 192 Wis. 2d 1, 13, 531 N.W.2d 32 (1995). "The Wisconsin constitution

creates three separate coordinate branches of government, no branch subordinate to the other, no branch to arrogate to itself control over the other except as is provided by the constitution, and no branch to exercise the power committed by the constitution to another." ***State v. Holmes***, 106 Wis. 2d 31, 42, 315 N.W.2d 703 (1982). "Each branch has a core zone of exclusive authority into which the other branches may not intrude." ***State ex rel. Friedrich***, 192 Wis. 2d at 13. In these core areas, "*any* exercise of authority by another branch of government is unconstitutional." ***Barland***, 216 Wis. 2d at 573-74 (citation omitted).

¶43 However, the majority of governmental powers lies within areas of shared authority, where the powers of the branches overlap. ***Id.*** at 573. "In these areas of 'shared power,' one branch of government may exercise power conferred on another only to an extent that does not unduly burden or substantially interfere with the other branch's exercise of power." ***Id.***

¶44 The defendants assert that because the Assembly passed and approved the Assembly Rules, which delineate the duties of legislators, the State seeks to "usurp this exclusive zone of legislative power" by interpreting the duties of WIS. STAT. § 946.12(3) to include provisions of WIS. STAT. chs. 11, 12 and 19. The defendants rely upon ***State ex rel. La Follette v. Stitt***, 114 Wis. 2d 358, 338 N.W.2d 684 (1983), implying that ***Stitt*** establishes an absolute bar to the judiciary interpreting legislative rules absent a constitutional mandate to do so or a deprivation of constitutionally protected rights.

¶45 The defendants misinterpret ***Stitt***. The ***Stitt*** court addressed, *inter alia*, whether the court had the authority to determine whether the legislature complied with its own internal operating rules or procedural statutes while enacting legislation. ***Stitt,*** 114 Wis. 2d at 364. The court was reluctant to make such a determination because of the separation of powers doctrine. ***Id.*** at 364-65.

¶46 That is not the issue before us. The court is not being asked to enforce legislative rules vis-à-vis the enactment of legislation. Instead, the court is being asked to enforce a penal statute associated with the duties of legislators and state employees, which are relevant insofar as the statute furnishes affected persons notice of those duties.

¶47 We conclude that consideration of the Assembly Employe Handbook, Representative Brancel's e-mail and Charlie Sanders's memo, in order to determine whether the defendants violated their duties as legislators and state employees, does not encroach upon the legislature's authority to establish its own rules of conduct and to discipline its members for any violation thereof. The defendants are not facing prosecution for violating the Assembly's internal rules. They are facing prosecution for having allegedly committed criminal misconduct in office.

¶48 The defendants also assert that a determination of whether a specific activity is legislative or political is necessarily a "political question" and is therefore non-justiciable under ***Baker v. Carr***, 369 U.S. 186 (1962). In ***Baker***, the United States Supreme Court considered the justiciability of claims implicating the political question doctrine. ***Id.*** at 209. The Supreme Court noted that various formulations of the political question doctrine involved a function of the separation of powers. ***Id.*** at 210-11. The Supreme Court held that an issue is non-justiciable if "prominent on the surface" of that issue it finds

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it, or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. The first and second factors are implicated in this case.

¶49 The defendants contend that because the State is prosecuting them based, in part, on an Assembly Rule, to proceed with the prosecution violates WIS. CONST. art. IV, § 8 under the first ***Baker*** factor – a textually demonstrable constitutional commitment of the issue to another branch of government. This is simply a repeat of the argument set forth above pertaining to restrictions on the court's ability to interpret legislative rules. For reasons already stated, we reject this argument.

¶50 As did Chvala, the defendants focus primarily on the second ***Baker*** factor, the alleged lack of judicially discoverable and manageable standards for prosecution under WIS. STAT. § 946.12(3). The defendants' arguments appear to address whether the rule prohibiting engagement in political campaign activity is sufficiently ambiguous so as to be non-justiciable. *See* ***United States v. Rostenkowski,*** 59 F.3d 1291, 1306 (D.C. Cir. 1995). In ***Chvala***, ___ Wis. 2d ___, ¶52, we construed this argument as follows: May a court interpret an internal legislative rule to determine criminal liability if, when applied to the facts of the specific case, the rule is not ambiguous? Now, as we did in ***Chvala***, we conclude it can. *See* ***id.***

¶51 In ***Chvala***, ___ Wis. 2d ___, ¶¶53-54, we adopted the analysis set forth in ***Rostenkowski***, 59 F.3d at 1291. It is appropriate for the judiciary to interpret legislative rules where a particular rule "is sufficiently clear that we can be confident in our interpretation." ***Chvala***, ___ Wis. 2d ___, ¶53 (citing ***Rostenkowski***, 59 F.3d at 1306). Consequently, we examine the complaint to determine whether the trial court will be required to interpret ambiguous Assembly Rules.

¶52 Here, the defendants' assertion that the State is asking us to ignore the Assembly Rules in favor of the prosecutor's own subjective definitions is without merit. The State does not ask us to ignore the Assembly Rules; indeed, the premise of this

prosecution is that the Assembly Rules help shape the scope of the defendants' duties under WIS. STAT. § 946.12(3). The Assembly Rules expressly prohibit any "political activity" using state time on state resources and establish a clear duty to refrain from doing so. This rule is unambiguous. We now examine whether the acts alleged in the criminal complaint can be clearly classified as "political activity."

¶53 Count One alleges that Foti and Jensen together hired Schultz to work in Foti's office to handle campaign fundraising as well as candidate recruitment and district travel. Both Foti and Jensen knew that Schultz was skilled in campaign work. Linda Hanson, an employee in Foti's Capitol office, and Foti discussed hiring a new legislative staffer for Foti's legislative staff who was to handle campaign fundraising, candidate recruitment and district traveling. Hanson told Foti she was very uncomfortable that Schultz was being hired as a state employee whose duties would concentrate solely on campaign-related activities. Hanson told Foti that under no circumstances was Schultz to perform campaign-related activities out of Foti's Capitol office.

¶54 At the time of Schultz's hiring, Jensen informed his chief of staff, Brett Healy, that Foti was willing to lend one of his staffers to assist the Assembly Republican Leadership team, which was headed by Jensen. When Foti hired Schultz, Jensen informed his staff members that Schultz would manage fundraising for candidates and vulnerable incumbents. Jensen and Foti both informed Jason Kratochwill, ARC policy director from 1995 until mid-1997, that Schultz would be responsible for individual campaign fundraising.

¶55 Even though Schultz was on Foti's payroll, her office was located at the ARC. Schultz visited Jensen's Capitol office approximately twice per week during campaign season and approximately twice per month the rest of the year to report on fundraising progress. Foti attended these meetings. Schultz would describe her progress

in helping various candidates and Jensen would provide her a list of candidates he wanted her to assist. Schultz coordinated fundraising events and assisted candidates with campaign finance reports. Schultz regularly attended RACC meetings, which were normally held in Jensen's Capitol office. At these RACC meetings, Schultz would inform everyone in attendance which candidates she was working with, what events were planned and how much money had been raised.

¶56 Schultz taught campaign fundraising at an RACC Candidate Campaign School in 1998 as part of her state employee duties. Any time the issue of campaign fundraising arose at a Leadership meeting, Jensen turned to Schultz for information. Schultz prepared call sheets for legislative leaders to use in making fundraising calls and kept track of the results of those calls as pledges came in.

¶57 Jensen frequently consulted with Schultz to determine how much money had been raised for a particular candidate. Schultz worked primarily with Jensen to establish dollar amounts for individual candidates to ensure that these goals were achieved. Jensen opposed relocating Schultz to non-state property because of the expense required for rental space. Jensen visited Schultz at her ARC office on several occasions. At meetings in Jensen's Capitol office, Jensen instructed Schultz to prepare campaign finance plans for vulnerable legislators. Schultz provided Jensen charts and reports detailing the amount of money raised for specific candidates. At an RACC meeting in Jensen's Capitol office after the 2000 elections, Jensen publicly thanked Schultz for all the money she had raised. Schultz informed others that Jensen wanted her to make fundraising calls, raise money for specific races and call lobbyists and legislators for specific races or candidates.

¶58 While both persons were located at the ARC, Kratochwill noted that Schultz was engaged almost exclusively in political campaign and fundraising work.

Kratochwill observed Schultz in possession of campaign contribution checks, observed her copying campaign checks at the ARC and observed her assist candidates fill out campaign finance reports. Kratochwill prepared an RACC organizational chart listing Schultz as a "fundraising coordinator." This chart was provided to both Jensen and Foti. A telephone list for the 2000 election named Schultz as the designated "financial" person. Schultz kept track of campaign funds raised by Jensen, Foti and other legislators for specific candidates. Lobbyists dropped off contribution checks at the Foti Capitol office and told the person receiving the checks to give them to Schultz. It was not unusual for Schultz to make comments to other legislative staffers in Foti's office that she was expecting checks to be delivered at the office.

¶59 Schultz answered directly to Foti but also answered, to a lesser extent, to Jensen. Foti gave Schultz campaign checks he received at his residence and Schultz would keep track of the checks and make the deposits. Schultz asked Michelle Arbiture, a Foti Capitol office employee, to use the Foti Capitol office constituent database to ensure the accuracy of Foti campaign finance reports. Schultz coordinated envelope-stuffing projects and created invitations for a Foti fundraiser. Schultz kept the books for various fundraisers, recording amounts contributed. Schultz usually went on vacation when there was not a "campaign crunch."

¶60 In late summer 2001, after the commencement of this criminal investigation, Jensen moved Schultz from the ARC office into the Capitol annex. Schultz eventually left state employment and worked full-time for the Republican party. No one interviewed by investigators could say Schultz performed any legitimate legislative duties while employed by the state.

¶61 The complaint further alleges Jensen told investigators he believes that state employees should not raise or discuss raising campaign money at all on state time.

Jensen reportedly said that legislators may occasionally approach him to discuss re-election issues involving their campaigns but no telephone calls or state telephones are used between any legislators and himself for fundraising details.

¶62 Count One, in all respects, unambiguously alleges that Jensen and Foti mutually agreed to hire Schultz to engage entirely in campaign activity, which is inconsistent with the duties and directives stated in the Assembly Employe Handbook, Brancel's e-mail and Sanders' memo. All the activities allegedly performed by Schultz, with the permission or at the instruction of Jensen and Foti, can clearly be classified as "political activity." We conclude that Count One alleges a violation of WIS. STAT. § 946.12(3) that is justiciable.

¶63 Count Two charges Schultz with misconduct in public office as a party to the crime for conducting campaign activities while compensated as a state employee or using state resources or both. The complaint alleges that Foti and Jensen hired Schultz for Foti's office solely to handle campaign fundraising as well as candidate recruitment and district travel. Again, both Foti and Jensen knew that Schultz was skilled in campaign work. Despite her employment with Foti's office, Schultz's office was located at the ARC. The factual allegations as stated in ¶¶53-61 in this opinion apply equally to Schultz and will not be repeated. Additional relevant facts alleged in the complaint are provided below.

¶64 Schultz kept track of campaign funds raised by Jensen and other legislators for specific candidates. At RACC meetings, Jensen instructed Schultz to contact particular groups to determine the size and timing of potential conduit contributions. After the *Wisconsin State Journal* series of newspaper articles were published in May 2001, alleging widespread use of state resources for campaign activities, Schultz stated she needed to "clean up the office" and noted that she could be in a lot of trouble, perhaps

even facing jail time; she also stated "If I'm going down, everyone's going down with me."

¶65 Count Two unambiguously alleges that Schultz was hired exclusively to engage in campaign activity, which clearly does not comport with the Assembly Employe Handbook, Brancel's e-mail and Sanders' memo. All the activities allegedly performed by Schultz can clearly be classified as "political activity." Count Two alleges a violation of WIS. STAT. § 946.12(3) which is justiciable.

¶66 Count Three charges Jensen with misconduct in public office as a party to the crime for intentionally hiring and/or supervising Ray Carey and Jason Kratochwill, state employees, to recruit or assist candidates for political office during times when Carey and Kratochwill were compensated as state employees or using state resources or both. Count Three realleges all the facts contained in Count One and further alleges that when Jensen, as ARC director, hired Carey, Jensen expected Carey to recruit candidates to run for office, manage campaigns of Assembly Republican candidates and help vulnerable Republican candidates maintain their Assembly seats. Carey regularly briefed Jensen on the trips he was making and pitches he was making to potential candidates. Carey instructed Rhonda Drachenberg, ARC executive assistant/office manager, to prepare a potential candidate database at the ARC.

¶67 In February 1997, Carey provided Jensen with a memo entitled "Review of '96 Campaign" which recommended that Leadership make it clear that staff were required to volunteer for campaign work. Carey's memo also stated that Jensen and Carey jointly decided where and when to purchase TV ads; that Jensen Capitol staffer Steve Baas's assistance was much appreciated as it "was wise to have a single dedicated person to help campaigns with earned media efforts" and Baas's efforts were "largely reactive to requests from Scott or the few staffers that understood the value of earned

media;" that Carey's biggest problem with candidate recruitment is that he "did 90% of it with no help from the party and little help from legislators (except for phone calls from the leadership)."

¶68 Furthermore, Kratochwill stated that while Jensen officially used a committee of legislators to hire the ARC director in February 1999, Jensen handpicked committee members to ensure Kratochwill would be hired. Jensen personally offered Kratochwill the ARC director position. After Kratochwill accepted the job, Jensen specifically informed Kratochwill that his primary job duty would be candidate recruitment. Jensen and Kratochwill had a series of conversations about the job where they discussed what campaigns should be targeted and why and how to organize the RACC structure. Jensen informed Kratochwill that Jensen wanted to shift campaign resources to vulnerable candidates.

¶69 While Kratochwill was ARC director, Jensen managed the ARC and all of Kratochwill's activities. Jensen and Kratochwill spoke often, without concern about Kratochwill using state time or state resources, about candidate recruitment, district polling, assignment of ARC and legislative staffers to particular campaigns, advertising strategy, campaign staffing and funding, opposition research and many other campaign issues. Carey, Kratochwill's predecessor, had started a potential candidate database at the ARC which Kratochwill continued to maintain. Jensen never instructed Kratochwill to take leave time or otherwise perform this work off state payroll.

¶70 Jensen accompanied Kratochwill on some candidate recruitment trips. Jensen demanded updates on candidate recruitment from Kratochwill. Oftentimes Jensen made indirect campaign-related contacts with Kratochwill through Jensen's staff. For example, Jensen's chief of staff Healy called Kratochwill at the ARC to report that the Republican Party would be giving a large financial donation to a particular independent

expenditure group. Jensen needed Kratochwill to know that the donation was part of an overall strategy to help Republican Assembly candidates.

¶71 Jensen and Kratochwill discussed how to get Capitol legislative staffers working on campaigns through SWARM (Staff Working for Assembly Republicans). In March 1999, Kratochwill created a memo for Jensen, labeled "Personal & Confidential," in which Kratochwill drafted an ARC organization chart listing two graphic design positions, an occupied position and a proposed position. Kratochwill asked Jensen to create this second graphic artist position at the ARC as a new state position. Jensen did so and hired a graphic artist who worked directly for Kratochwill. This March 1999 "Personal & Confidential" memo also included a description of a potential new state employee hire who would have the following "confidential duties:" deconstruction of 1998 (2000) target races; organization and coordination of staff training and campaign schools; development of 2000 strategy and organization design; compilation of polling, targeting and demographic data; re-design of Get-Out-The-Vote campaigns; and list development and management. Kratochwill estimated that the campaigns of fifty of the fifty-six Republican members of the State Assembly used the ARC for campaign purposes that included graphic design work.

¶72 Rhonda Drachenberg, executive assistant/office manager at the ARC from March 1997 to August 2000, worked on potential candidate databases at ARC offices. Eventually she was responsible for managing the database and sending out mailings to potential candidates. At some point Kratochwill asked Drachenberg to create a memo addressing "potential candidates procedures" to be used by Lyndee Wall, a new ARC staffer. Kratochwill instructed Drachenberg to include a statement in the memo saying, "Never, ever tell anyone that you are working on something for RACC, this would cause serious problems."

¶73 During summer and fall of 2000, Kratochwill accompanied Jensen to several meetings with Wisconsin Manufacturers and Commerce (WMC) and lobbyists from various organizations, including the Farm Bureau, the Wisconsin Builders Association, the Wisconsin Realtors Association and WMC. These meetings focused on political campaign issues and then later on particular campaigns. Kratochwill reported on certain races, campaign issues and poll results while lobbyists discussed potential financial commitments. These meetings were, in part, to help Jensen, with input from Kratochwill, prioritize Assembly Republican spending.

¶74 Kratochwill also determined which ARC and legislative staffers were going to go "off" the state payroll and what their percentages of state and non-state time would be. These proposals were sent to Jensen. However, it was clear that these were "phony" numbers and that staffers were to be out in the field in the months before the election working the campaigns full-time. These staffers were paid by the state for many of those hours. For instance, even though one particular Jensen Capitol office staffer, Brian Dake, was listed as off the state payroll 50% of the time, Jensen knew that Dake was working full-time on a campaign and informed Kratochwill that Dake was totally available to work on campaigns. Despite this knowledge, Jensen signed off on a 50% leave for Dake, which was the largest percentage of time any staff person took off to work on a campaign.

¶75 Dake worked as an ARC staffer from December 1997 to January 2000 and then in Jensen's Capitol office beginning in January 2000. Dake stated that the environment in the Capitol prior to the Ethics Board Agreement establishing new work rules in 2001 was that everybody performed campaign activities on state time. Dake claims neither Jensen nor any staff members told him he was required to use vacation or compensation time while campaigning. Dake worked with ARC graphic artists Lee Reidesel, Eric Grant and Kacy Hack on campaign materials.

¶76 Carolyn Hughes was employed as a policy analyst in the ARC from May or June 2000 to September 2001. One month after starting her job, Kratochwill assigned her the responsibility of managing a campaign for an Assembly seat in northern Wisconsin. The Republican Party of Wisconsin paid part of her wages. However, in August 2000, Hughes moved to the northern district where she worked full-time on the campaign. She performed no legitimate legislative work after moving there. Hughes continued to be paid by the state in part and by the Republican Party in part. She met with Jensen on two different occasions to discuss campaign issues such as literature drops, door-to-door visits and fundraising status.

¶77 In an October 16, 2002 memo from Jensen to Kratochwill, Schultz, Healy and another legislative staffer, Jensen instructed Kratochwill to survey campaign managers about how much money was needed to finish their campaign plans and how much money they could raise locally. After the newspaper allegations disclosed that the ARC had been used extensively for campaign activity, Kratochwill and Jensen had a series of discussions on the topic. Jensen never expressed surprise or misunderstanding of the allegations but instead focused more on attempting to destroy the credibility of the former ARC staffer who had spoken publicly about ARC campaign practices.

¶78 Tom Petri, a former ARC staffer, stated that after the newspaper allegations became public, he attended a meeting at a bar in Madison with Jensen, Representative Bonnie Ladwig and other ARC staffers. In essence Jensen told them, "Don't think you guys did anything better or worse than other caucuses or people before you. You're just the ones who were here when the shit hit the fan." Jensen is also reported to have said, "Your hard work won't be forgotten. You're not going to prison. You'll be taken care of."

¶79 Count Three unambiguously alleges that Jensen explicitly instructed and implicitly allowed both Carey and Kratochwill to recruit or assist candidates for political office on state time using state money. All activities allegedly performed by Carey and Kratochwill, at Jensen's specific instruction or with his tacit approval, can clearly be classified as "political activity." In all respects, the allegations in Count Three establish a justiciable violation of WIS. STAT. § 946.12(3).

¶80 Count Four charges Jensen with misconduct in public office as a party to the crime for intentionally retaining and supervising state employees to work for Taxpayers for Jensen while the employees were compensated as state employees or using state resources or both. Count Four alleges that Carrie Hoeper Richard was employed in Jensen's Capitol office from August 25, 1997 through October 7, 1999. Richard claims that from the first telephone call she received about the open position in Jensen's Capitol office, it was made clear to her that the position's responsibilities included campaign fundraising. Fundraising was discussed during her interview with Jensen at a Milwaukee brewery. At that time, Jensen informed Richard that he was thinking of running for governor and needed an organized fundraiser to do so.

¶81 During her first six months' employment with Jensen's office, Richard spent 50% of her time on Jensen campaign-related work. Thereafter, Richard reports, she spent approximately 80% of her time in the Jensen Capitol office doing Jensen campaign-related work. Her first task as a Jensen legislative staffer was to work on a campaign fundraiser for Jensen, which she did full-time for two weeks. Other Jensen Capitol staffers expressed great satisfaction that one person would be responsible for the fundraiser. Richard never heard Jensen warn anyone in his office not to perform campaign activities on state property or during state time.

¶82 Richard worked with ARC graphic artists on Jensen campaign-related materials. She occasionally met with Jensen in his Capitol office to discuss details of fundraising events and to report on her fundraising activities. Richard became Jensen's campaign treasurer and began completing his campaign finance reports in the Jensen Capitol office. As part of her duties as treasurer for Taxpayers for Jensen, Richard entered campaign contribution information on a database that she worked on, in part, in Jensen's Capitol office. Richard received campaign contribution checks at Jensen's Capitol office; Jensen brought his campaign-related mail into the Capitol office from his home. Richard obtained the campaign contributions and entered the information into the database.

¶83 All Jensen Capitol office staffers helped out stuffing envelopes with fundraiser letters or thank-you notes, usually in Jensen's Capitol office. Other Capitol staff members were recruited to assist in stuffing envelopes. Jensen was not present when the envelope stuffing took place but was aware of it because staff talked with him about it and let him know when they were finished. Another Jensen Capitol office staffer, Steve Baas, regularly drafted fundraising letters for Jensen's campaign while in Jensen's office. Jensen reviewed many of these letters.

¶84 Baas wrote the newsletter for Jensen's Speaker's Club. The newsletter was distributed only to those who contributed at least $125 toward Jensen's campaign. Baas worked with an ARC graphic artist on the design and layout of the newsletter. Richard prepared fundraising telephone call lists for Jensen. Jensen made some of these calls from his Capitol office. Richard provided Jensen with campaign event progress reports and created lists of potential hosts based on lists of Jensen's campaign contributors. Jensen always reviewed his fundraising letters and his campaign finance records. Most of the campaign-related conversations between Richard and Jensen occurred while both of them were in Jensen's Capitol office or during staff meetings held in Jensen's Capitol

office. Richard photocopied checks for campaign finance reports using Jensen's Capitol office copy machine. Chad Taylor, who worked in Jensen's Capitol office from November 1997 to November 1999, frequently observed Taxpayers for Jensen campaign finance reports sitting on copying machines and desks in the office. When Taylor first began employment with Jensen, Jensen told him it was illegal to perform campaign activities on state time or with state resources.

¶85 In 1999, former ARC employee Paul Tessmer was asked by Jensen's chief of staff Healy to develop a campaign finance computer software program. It was Tessmer's understanding that Healy wanted the campaign finance reporting program for Jensen. Once Tessmer's program was operational, Richard would occasionally ask Tessmer to come to Jensen's Capitol office to help Richard with any software problem she might be having. Staffers in Jensen's Capitol office used Tessmer's software program extensively.

¶86 Leigh Himebauch was employed as a limited term employee in Jensen's Capitol office from October 1997 through May 2000. Although Himebauch was officially listed on the ARC payroll, she continued to work for Jensen performing the same campaign-related duties while with the ARC. While employed by both Jensen and the ARC, Himebauch's primary duties involved campaign fundraising work for Taxpayers for Jensen. These duties, performed primarily in the Jensen Capitol office using state resources, included photocopying checks, entering campaign contributions in a computer database, creating and maintaining financial records for Taxpayers for Jensen and running reports or providing information to Jensen on campaign contributions. Himebauch also created lists of people for Jensen to call for campaign contributions. Himebauch's duties also included planning and scheduling data management for Jensen fundraisers. Himebauch received campaign contribution checks from various sources. Jensen brought campaign contribution checks into his Capitol office and left them for

either Himebauch or Richard. Himebauch's duties also included planning, scheduling and data management for Jensen fundraisers, which encompassed invitations and thank-you letters preparation. Between May and November 2000, Himebauch worked 100% of the time on Taxpayers for Jensen, processing checks, filling out deposits, retrieving Jensen campaign mail and creating mailing lists.

¶87 Eventually, Himebauch moved to the Republican Party offices. She continued to perform campaign-related duties on Jensen's behalf while receiving her monthly state paycheck from the Chief Clerk's office or the ARC. Himebauch worked regular business hours from 8:00 a.m. to 5:00 p.m., Monday through Friday. She continued to use state equipment to raise campaign funds for Taxpayers for Jensen, such as a laptop computer. Himebauch handled two fundraisers for Jensen while located at the Republican Party offices. During Himebauch's entire tenure with Jensen, not once did he inform her of the impropriety of campaigning on state time with state resources. The campaign finance reports for Taxpayers for Jensen for the period of 1998-2002 showed Himebauch was paid only $170.53 by Taxpayers for Jensen.

¶88 Other allegations in the complaint, too numerous to specifically address here, plainly and unambiguously paint a thorough picture of legislative and ARC staffers performing campaign-related work on behalf of Taxpayers for Jensen. Count Four unambiguously alleges that Jensen intentionally retained and supervised state employees to work for Taxpayers for Jensen while these employees were compensated as state employees or using state resources or both. All the activities allegedly performed by state employees at Jensen's specific behest or with his knowledge that benefited him through Taxpayers for Jensen can clearly be classified as "political activity." Count Four alleges a violation of WIS. STAT. § 946.12(3) that is justiciable.

¶89 Count Five charges Jensen[7] with misdemeanor intentional misuse of a public position for private benefit as a party to the crime for obtaining financial gain for the private benefit of the RACC while he was a state public official. All the previous allegations set forth for Counts One through Five are re-alleged. The complaint further alleges that a Wisconsin Representative employed Virginia Mueller Keleher from August 1994 to December 2000. During 1995 and 1996, Keleher performed RACC duties while paid as a full-time state employee. Starting in June 1996, Keleher's office was located at the ARC but she performed duties solely for RACC. In performing her RACC duties, Keleher had at least weekly contact with Jensen. Jensen frequently sent his staff to Keleher for information on RACC money received. In addition, it was not unusual for Jensen to visit the ARC directly to obtain RACC information. In February 1997, Keleher delivered her RACC materials to Representative Ladwig and eventually to Greg Reiman.

¶90 Greg Reiman was employed by Jensen's Capitol office as a limited term employee from September 1996 until January 1997. In January 1997, Reiman began work in the Ladwig Capitol office where he remained until the end of 1998. Reiman occasionally attended RACC meetings which were held in Jensen's office. Typical discussions involved RACC fundraising and expenditures, proposed budgets and vulnerable candidates. Toward the end of 1998, Reiman was informed that Assembly Republican leadership wanted Remain to help with a special project, specifically, to track over the course of an entire election cycle all special interest contributions to every candidate. Reiman was informed the project was a big favor for Jensen and he was sent to Jensen's office for further instructions.

[7] Count Five of the criminal complaint also charges Bonnie L. Ladwig with misdemeanor intentional misuse of a public position for private benefit. However, Ladwig did not participate in this appeal and her alleged involvement will not be addressed in this decision.

¶91 Jensen explained to Reiman that he was to create a thorough analysis of special interest money going into all Assembly races, creating a comprehensive money trail for the entire election cycle for the entire Assembly. Jensen informed Reiman that it might be better for him to leave Ladwig's office and Jensen would help find Reiman a job in the Capitol after the project was complete. Jensen told Reiman to go to the ARC and have ARC Director Carey find him office space to work on the project. Reiman's work on the special project, which included three separate reports that were provided to Jensen, lasted from August to December 1998. Both Jensen and Ladwig supervised Reiman. Jensen used the results of this project to request contributions from lobbyists to RACC.

¶92 Count Five unambiguously alleges that Jensen obtained financial gain for the private benefit of the RACC while he was a state public official. This conduct violates his duty as set forth in the Assembly Employe Handbook, Brancel's e-mail, Sanders' memo and WIS. STAT. § 19.45(2) to refrain from "political activity" using state resources. Count Five alleges a justiciable violation of § 19.45(2).

¶93 All the allegations of the criminal complaint describe campaign activity of the most basic type: the preparation and dissemination of campaign literature, political fundraising on behalf of a number of candidates for the Wisconsin Assembly, the delivery and receipt of campaign funds in state offices by lobbyists and state employees, campaign data management on state computers, daily monitoring of campaign progress by all three defendants, development and implementation of campaign strategy and debriefing of an election cycle on state time in state offices. The result: public financing of private campaigns without the public's permission. There is no reasonable argument that this alleged activity serves any legitimate legislative duty or purpose. No statute, rule or policy sanctions this behavior.

Probable cause

¶94 Finally, the defendants argue the factual allegations of the complaint are insufficient to sustain probable cause. Specifically, the defendants argue the criminal complaint fails to present any facts demonstrating that their conduct was inconsistent with the duties of their offices or employment and the criminal complaint contradicts itself in attempting to allege that Schultz exercised any discretionary power. We disagree with these contentions.

¶95 The sufficiency of a criminal complaint is a question of law we review de novo. ***State v. Manthey***, 169 Wis. 2d 673, 685, 487 N.W.2d 44 (Ct. App. 1992). A criminal complaint is a self-contained charge which must set forth facts that are sufficient, in themselves or together with reasonable inferences to which they give rise, to allow a reasonable person to conclude that a crime was probably committed and that the defendant is probably culpable. ***State v. Bembenek***, 111 Wis. 2d 617, 626, 331 N.W.2d 616 (Ct. App. 1983). When the sufficiency of the criminal complaint is challenged, the facts alleged in the complaint must be sufficient to establish probable cause, not in a hypertechnical sense but in a minimally adequate way through a commonsense evaluation by a neutral judge making a judgment that a crime has been committed. ***Id.*** The judge need only be able to answer the hypothetical question: "What makes you think the defendant committed the offense charged?" ***Id.*** at 626-27. The complaint is sufficient if it answers the following questions: What is the charge? Who is charged? When and where is the offense alleged to have taken place? Why is this particular person being charged? Who says so? ***Id.*** at 627. Where reasonable inferences may be drawn establishing probable cause that supports the charge, and equally reasonable inferences may be drawn to the contrary, the criminal complaint is sufficient. ***Manthey***, 169 Wis. 2d at 688-89.

¶96 After reviewing the criminal complaint, we are satisfied that it answers all the required questions. As to the first question, "What is the charge?," the complaint states that Scott R. Jensen is charged with three counts of felony Misconduct in Public Office as a party to a crime, in violation of WIS. STAT. §§ 939.05 and 946.12(3) and one misdemeanor count of Intentional Misuse of Public Positions for Private Benefit as a party to a crime, in violation of §§ 939.05, 19.45(2) and 19.58(1); Steven M. Foti is charged with one count of felony Misconduct in Public Office as a party to a crime, in violation of §§ 939.05 and 946.12(3); and Sherry L. Schultz is charged with one count of felony Misconduct in Public Office as a party to a crime, in violation of §§ 939.05 and 946.12(3).

¶97 As to the second question, "Who is charged?," the complaint states that Scott R. Jensen, Steven M. Foti and Sherry L. Schultz are charged with the crimes listed. As to the third question, "When and where is the offense alleged to have taken place?," the complaint states that the alleged offenses occurred over a period of time (from approximately 1997 through 2000) at various state government offices in Madison, Wisconsin.

¶98 As to the fourth question, "Why is this particular person being charged?," the complaint contains numerous allegations that are sufficient, together with reasonable inferences, to allow a reasonable person to conclude that Jensen, Foti and Schultz probably committed the crimes charged. The facts of each count have previously been set forth at length and will not be repeated. The complaint more than adequately justifies why these three defendants have been charged.

¶99 As to the fifth question, "Who says so?," the complaint indicates that the complaining witness is Wisconsin Department of Justice — Division of Criminal Investigation Director David Collins and contains an affidavit from Collins in his official

capacity. Collins learned of the alleged offenses from his own observations and the reports of DCI special agents prepared in the course of their duties.

¶100 It is well-settled that a complaint need not establish a defendant's guilt beyond a reasonable doubt. ***Bembenek***, 111 Wis. 2d at 628. The complaint is the first of many steps in a criminal prosecution and its essential function is informative, not adjudicative. ***Id.*** The factual allegations here are more than sufficient to support probable cause.

CONCLUSION

¶101 For the foregoing reasons we conclude that WIS. STAT. § 946.12(3) is not vague or overly broad. We also conclude this prosecution does not violate the separation of powers doctrine. Moreover, we conclude that the criminal complaint is sufficient to sustain probable cause. Accordingly, we affirm the circuit court's order denying the defendants' motion to dismiss.

By the Court.—Order affirmed.

Appeal No. 03-0106-CR

Cir. Ct. Nos. 02CF002453
02CF002454
02CF002455

WISCONSIN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT R. JENSEN, STEVEN M. FOTI, AND SHERRY L. SCHULTZ,

DEFENDANTS-PETITIONERS.

FILED

FEB 18, 2003

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Vergeront, P.J., Dykman and Lundsten, JJ.

The State charged State Representative and former Assembly Speaker Scott Jensen, Assembly Majority Leader Steven Foti, and former state employee Sherry Schultz with being parties to the crime of felony misconduct in public office, based on allegations that Jensen and Foti hired and supervised Schultz and others to perform various campaign-related activities on state time and using state resources. Jensen, Foti, and Schultz moved to dismiss the misconduct charges on the grounds that the particular subsection of the felony misconduct in public office statute under which they were charged, WIS. STAT. § 946.12(3) (1999-2000),[1] is vague and overbroad; that its application to the facts of this case

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

violates the separation of powers doctrine; and that the allegations in the complaint fail to establish probable cause for felony misconduct. The trial court denied each of the motions.

This court granted interlocutory review pursuant to WIS. STAT. RULE 809.50 for the purpose of either clarifying further proceedings or materially advancing the termination of the litigation. Upon reviewing the petition and response, we are persuaded that several of the issues raised by the defendants revolve around a central question—namely, whether a public official in this state has a duty to refrain from engaging in all or certain types of campaign activity on state time or using state resources. The scope of any duty to refrain from campaigning on state time or with state resources could be instrumental in resolving a secondary question as to whether prosecution for felony misconduct based on campaign activity could have a chilling effect on otherwise legitimate legislative activity. Because we believe that these questions are of statewide importance, and that definitive answers by the highest court of this state in the early stages of this proceeding could save both the parties and the judiciary considerable time and resources, we now certify this appeal to the Wisconsin Supreme Court.

WISCONSIN STAT. § 946.12(3) sets forth four elements for felony misconduct in public office:

1) The defendant was a "public officer" or "public employe."

2) The defendant, in his or her capacity as such officer or employee, "exercised a discretionary power" by doing or failing to do something.

3) The defendant exercised his or her discretionary power "in a manner inconsistent with the duties" of the office or "the rights of others."

4) The defendant exercised his or her discretionary power "with intent to obtain a dishonest advantage" for himself or herself or another.

See WIS JI—CRIMINAL 1732.

The meaning of "duty" encompassed in the third element is at the crux of the parties' dispute. Under the form jury instruction, the trial judge will need to fill in the following blank: "As a (position), it was defendant's duty to _____." *See* WIS JI—CRIMINAL 1732. It would then be a jury question as to whether the defendant exercised a discretionary power in a manner inconsistent with that duty. *See State v. Schwarze*, 120 Wis. 2d 453, 455-56, 355 N.W.2d 842 (Ct. App. 1984) (the existence and definition of a public officer or public employee's "duty" is a question of law upon which the trial court must instruct the jury).

The defendants claim that the felony misconduct in public office statute is unconstitutionally vague because it fails to give fair notice to a person of ordinary intelligence that campaign activity in support of candidates of the actor's own political party is "inconsistent with the duties of [the actor's] office," as set forth in the third element above. *See State v. Tronca*, 84 Wis. 2d 68, 86, 267 N.W.2d 216 (1978) (vagueness doctrine of fair notice must be applied to actual conduct charged, rather than hypothetical situations). Stated differently, the defendants appear to argue that the State has not and cannot demonstrate that either statutes dealing with campaign financing or any other source gives fair notice that no campaign activity by a state official or employee is permitted while the official or employee is on state time or using state resources. The defendants apparently acknowledge that some specified campaign activities are prohibited,

but contend that there is no general prohibition against all campaign activity, or against many of the campaign activities alleged here.

The State responds that "[u]nder Chapters 11, 12, and 19, of the Wisconsin Statutes, state officials may not hire and supervise staff at public expense to work directly on political campaigns." We understand the State to further rely on the proposition that even if no specific statute or set of statutes prohibits all of the various types of campaign activity alleged in the complaint, a "'common-sense reading of the law collectively and the statutes and the Ethics Code makes it clear that [the defendants' actions are] not permitted.'" (State's response to petition for leave to appeal at 10, quoting trial court.)

The State provides the following statutes and summaries:

- WIS. STAT. § 19.41(1) (state public officials must "avoid conflicts between their personal interests and their public responsibilities");
- WIS. STAT. § 19.45(1) (state public officials hold their positions "as a public trust, and any effort to realize substantial personal gain through official conduct is a violation of that trust"; they may pursue interests outside their public service so long as any such interest "in no way interferes with the full and faithful discharge of his or her duties to this state");
- WIS. STAT. § 19.45(2) and (5) (no state public official may use his position to obtain anything of substantial value for the private benefit of an organization with which he is associated, or use or attempt to use his position to gain unlawful benefits or advantages personally or for others);
- WIS. STAT. § 19:46(1)(b) (no state public official may use his office in a way that assists in the production of a substantial benefit, direct or indirect, for an organization with which the official is associated);

- WIS. STAT. § 11.001(2) ("to ensure fair and impartial elections," officeholders are "preclud[ed] ... from utilizing the perquisites of office at public expense in order to gain an advantage over nonincumbent candidates who have no perquisites available to them");
- WIS. STAT. § 11.36(3) (requiring that those in control of a state occupied office prohibit others from entering that office for purposes of making or receiving campaign contributions);
- WIS. STAT. § 11.37 (restricting use of state vehicles for campaign purposes);
- WIS. STAT. § 11.33(2) (governs timing of when state officials may make mass mailings of political purpose items).

In addition, referring to WIS. STAT. §§ 12.07(3), 12.07(4), and 12.08, the State specifically asserts "Chapter 12 ... clearly prohibits hiring state employees as campaign workers." (State's response to petition for leave to appeal at 16.)

However, our examination of the statutes cited by the State seems to confirm that no statute or group of statutes generally or specifically prohibits campaigning or directing others to campaign on state time or using state resources. For that matter, we find no explicit general prohibition against campaigning on state time using state resources. Further, it appears that some of the alleged conduct does not fall under any specific prohibition. For example, it is not apparent that any particular statute prohibits Jensen and Foti from discussing strategy for the campaigns of their party members or prohibits Sherry Schultz from maintaining fundraising records. Indeed, some of the statutes cited, such as WIS. STAT. §§ 11.001(2) and 19.45(1), appear to contain broad policy language rather than to prohibit any specific conduct.

If allegations of campaign activity on state time or using state resources are not covered by specific statutory prohibitions, are they nonetheless prohibited because they are contrary to "duties" gleaned from a collective reading of the statutes? In this regard, the State apparently asks the courts to rely on a common-sense reading of the types of activities that are expressly prohibited and general descriptions of the objective of the legislative branch, such as "determining policies and programs and review of program performance for programs previously authorized." WIS. STAT. § 15.001(1). The State contends that these statutes and affirmative descriptions do not suggest any intent to include political campaigning within the sphere of legislative functions.

Common sense may tell us that a state official or state employee should not be permitted to apply state resources to political campaigns. But the question here is whether the felony misconduct in public office statute gives fair notice that certain campaign activity done on state time or with state resources is a violation of a particular felony statute. A statute is unconstitutionally vague if it fails to give fair notice of prohibited conduct to a person of ordinary intelligence. *See State v. Pittman*, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993).

Accordingly, this case presents several important questions. May "duties" under WIS. STAT. § 946.12(3) be inferred from the statutes collectively, or must the State show that each particular allegation violated a particular statute? Is it possible to show that particular conduct is "inconsistent" with a duty imposed by statute even if the conduct does not directly violate a statute?

Furthermore, if particular conduct does violate a specific misdemeanor or forfeiture statute, does the more general felony statute apply and would a person of ordinary intelligence realize this? The defendants note that

WIS. STAT. §§ 11.36 and 11.37 are treated as civil rather than criminal offenses. The defendants analogize to administrative rule violations, citing *State v. Dekker*, 112 Wis. 2d 304, 332 N.W.2d 816 (Ct. App. 1983), which states:

> The failure to carry out a duty contained in a departmental rule cannot be bootstrapped into the felony of misconduct in public office. It is contrary to public policy to convert a departmental disciplinary rule into a crime, except if the departmental rule specifically prohibits some form of criminal conduct.

Id. at 312. Does the addition of the mental element "with intent to obtain a dishonest advantage," contained in WIS. STAT. § 946.12(3), or some other theory, permit prosecution for both the specific violation and felony misconduct in public office?

If WIS. STAT. § 946.12(3) is found to be unconstitutionally vague with respect to the allegations made here, the defendants' other issues need not be addressed. On the other hand, if defendants' vagueness challenge fails, the resolution of defendants' remaining claims as to the sufficiency of the complaint and the alleged lack of judicially manageable standards under the separation of powers doctrine would appear to be reasonably straightforward.

Clarification of a public official's duties with respect to campaign activity would also help resolve the defendants' remaining claim that application of the felony misconduct statute to campaign activity would have a chilling effect on dually-motivated or other legitimate legislative activity. For example, if all campaigning on state time is prohibited, would a legislator be barred from discussing the impact of campaign finance reform on the election prospects of his or her own party?

The resolution of these issues would provide valuable and timely guidance to the trial court. Resolution may affect which charges, if any, may proceed and may greatly assist the trial court in fashioning appropriate jury instructions on "duty." For these reasons, we believe that this is an appropriate case for certification.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

SCOTT R. JENSEN
STEVEN M. FOTI
SHERRY L. SCHULTZ

Case No. 02-CF-2453
Case No. 02-CF-2454
Case No. 02-CF-2455

Defendants.

ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS

On January 10, 2003, the captioned matters came on for hearing on the pretrial motions filed by defendants Scott R. Jensen, Steven M. Foti and Sherry L. Schultz seeking dismissal of the charges against them on the following grounds:

1. Section 946.12(3), *Stats.*, is unconstitutional as applied in that it is vague and overbroad and its application to the facts alleged in this case improperly invades the provinces of the legislative branch of government, contrary to the Fifth and Fourteenth Amendments to the United States Constitution, the Separation of Powers Doctrine and the correlative sections of the Wisconsin Constitution.

2. The criminal complaint is insufficient to sustain the charged offenses involving misconduct in public office, contrary to section 946.12(3), *Stats.*, in that it is deficient under section 968.03, *Stats.*, and relevant Wisconsin caselaw because it fails to allege any facts, identifying defendants' duties, how they acted inconsistently with those duties and how their alleged actions were intended to obtain any dishonest advantage. The complaint thus fails to provide defendants with due process of law and sufficient notice as required by the Fifth and Fourteenth Amendments to the United States Constitution and the correlative sections of the Wisconsin Constitution.

After considering the pleadings and papers on file and the arguments presented by counsel,

IT IS HEREBY ORDERED THAT all of defendants' motions are DENIED.

Dated this 10 day of January, 2003.

BY THE COURT:

DANIEL R. MOESER
Circuit Court Judge

THIS DOCUMENT DRAFTED BY:

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STATE OF WISCONSIN
IN SUPREME COURT

No. 03-0106-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SCOTT R. JENSEN,
STEVEN M. FOTI and
SHERRY L. SCHULTZ,

Defendants-Appellants-Petitioners.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT IV, AFFIRMING A PRETRIAL ORDER DENYING PETITIONERS' MOTION TO DISMISS THE CRIMINAL COMPLAINT, ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE DANIEL R. MOESER, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN

IN SUPREME COURT

No. 03-0106-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SCOTT R. JENSEN,
STEVEN M. FOTI and
SHERRY L. SCHULTZ,

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ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT IV, AFFIRMING A PRETRIAL ORDER DENYING PETITIONERS' MOTION TO DISMISS THE CRIMINAL COMPLAINT, ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE DANIEL R. MOESER, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is warranted. The state does not oppose petitioners' request for oral argument.

INTRODUCTION

Petitioners Scott R. Jensen, Steven M. Foti and Sherry L. Schultz are charged with misconduct in public office for using state resources for private campaign activity. According to the criminal complaint, Jensen and Foti, state legislators, hired Schultz into a well-compensated state job, which they supervised, for the exclusive purpose of helping to run private political campaigns. Jensen also supervised state employees, Jason Kratochwill and Ray Carey, for this purpose as well as other state employees to work on Taxpayers for Jensen. In the words of the trial court, petitioners "worked together and conspired to use state money, state time, state resources to basically orchestrate the continuation of their existence and, in some situations, to elect or reelect others who were similarly situated with respect to their views." (42:84).

Petitioners assert that Wis. Stat. § 946.12(3) is unconstitutionally vague as applied, overbroad and interferes with the separation of powers. All of their arguments are legally and logically infirm and must be rejected.

ARGUMENT

I. PETITIONERS LACK STANDING TO CHALLENGE WIS. STAT. § 946.12(3) ON GROUNDS OF VAGUENESS.

Petitioners first assert that § 946.12(3) is unconstitutionally vague as applied to the conduct alleged in the complaint. They are without standing to raise this issue. In *State v. Tronca*, 84 Wis.2d 68, 267 N.W.2d 216 (1978), this court held that defendants who were actually aware of the criminality of their actions, as petitioners were here, did not have standing to challenge the official misconduct statute on grounds of vagueness. In reaching its conclusion, the court looked at defendants' attempts to cover up their unlawful behavior and evidence that they knew what they were doing was illegal, finding the

evidence demonstrated that "[e]ach of the defendants was well aware that he was approaching the area proscribed by the statute." *Id.* at 87.

Tronca is squarely on point. The criminal complaint provides clear factual allegations that petitioners knew that the conduct with which they are charged is unlawful. According to the complaint, Assembly members and staff were specifically notified that using state employees and resources for campaign work was prohibited (1:5-6; R-Ap. 105-106).[1]

Further, in direct contrast with his position on appeal, Jensen told investigators that state employees should not raise or discuss raising campaign money at all on state time (1:23; R-Ap. 123). He also said that his actions would have made clear that all work for the Republican Assembly Campaign Committee needed to be done off of state time (1:33; R-Ap. 133). Likewise, Jensen told an employee in the Jensen Capitol office in November 1997 that it was illegal to do campaign work on state time or using state property (1:37-38; R-Ap. 137-138).

Jensen's false statements to investigators demonstrate his awareness that his actions were illegal. For example, Jensen said that during the time Schultz worked for Foti, Jensen did not know what Schultz's duties were (1:23; R-Ap. 123). However, the criminal complaint alleges that Jensen not only knew what Schultz's duties were, but that he actually directed those duties (1:12; R-Ap. 112). When Schultz was hired by the Foti office, Jensen told his capitol office staff that Schultz would manage fundraising for candidates and vulnerable incumbents and that she would be located at the Assembly Republican Caucus (ARC) offices (1:8; R-Ap. 118).

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[1]The record consists of three separate sub-records, one for each appellant. All of the record citations contained in the state's brief refer to the record item numbers in the *Jensen* case, Case No. 03-0106-CR.

Jensen also asserted to investigators that he believed Schultz "volunteered" to help Republican candidates with fundraising work (1:23; R-Ap. 123). This assertion is belied by numerous allegations in the criminal complaint, including the frequency and nature of the contacts Jensen had with Schultz. In addition, the complaint alleges that Jensen was aware that the proposed numbers for staff's percentage of time off the state payroll while working on campaigns were "phony" (1:30; R-Ap. 130).

Foti and Schultz likewise knew they were acting inconsistently with their duties as public officials. The complaint states that on more than one occasion, Linda Hanson, an employee of Foti's Capitol office, explicitly warned Foti that hiring Schultz as a state employee for strictly campaign-related chores was improper, but Foti and Jensen went ahead with the plan nonetheless. Hanson told Foti that "there was no way that Schultz was going to do that kind of work out of the Foti Capitol office" (1:7; R-Ap. 107). Schultz did so anyway, under the direction of Jensen and Foti.

In early to mid-1999, ARC director Jason Kratochwill spoke with Schultz, Jensen, and Foti about relocating Schultz to non-state property so that Schultz would not be engaging in private, campaign fundraising on state property (1:12; R-Ap. 112). Schultz took the position that if she moved to space owned by the Republican Party there would still be evidence, such as her use of state e-mail, revealing that she was a state employee and that it would be too obvious if she did all of her fundraising at Republican Party headquarters (*id.*). Jensen, Foti, and Ladwig opposed moving Schultz to privately rented space because of the expense that would represent to private campaign budgets (*id.*). In April or May 2000, Kratochwill met with Foti and asked him if Schultz could be relocated from the publicly funded ARC space to the privately funded Republican Party of Wisconsin (*id.*). Foti said no (*id.*).

In May 2001, when newspaper articles appeared regarding the caucuses, Schultz told a graphic artist at the ARC that Schultz could be in a lot of trouble, perhaps facing jail, if people found out what she did (1:16; R-Ap. 116). Schultz said that what she did would get her into a lot more trouble than what the graphic artists did (*id.*).

Tom Petri, also an employee at the ARC, stated that after newspaper articles appeared alleging widespread use of state resources for campaign activities, Schultz told Petri that she had to "clean up the office," meaning that she wanted to remove campaign items from her space at the publicly funded ARC (1:21; R-Ap. 121). Shortly thereafter, Petri walked through Schultz's ARC office and noticed that it had been "cleaned out."

Lyndee Wall, an ARC employee, offered to help Schultz get rid of campaign-related items from her office and Schultz replied that she did not have a single "legitimate," that is, non-campaign related, item in her office (1:22; R-Ap. 122).

In light of their demonstrated knowledge that what they were doing was unlawful and inconsistent with the duties of their public office, as indicated by their express acknowledgement and their efforts to conceal their wrongdoing, under *Tronca*, petitioners lack standing to challenge the statute on grounds of vagueness.

II. PETITIONERS FAIL TO DEMONSTRATE THAT THE OFFICIAL MISCONDUCT STATUTE, AS APPLIED IN THIS CASE, IS VAGUE BEYOND A REASONABLE DOUBT.

Petitioners assert that § 946.12(3) is unconstitutionally vague as applied to them because that

statute does not define "duties" and therefore does not provide sufficient notice.

In light of the facts set forth above establishing that they did indeed know they had a duty to refrain from conducting campaigns on state time using state resources, it is disingenuous for petitioners to argue that they had no notice of such a duty.

A. Legal standards governing vagueness claims.

A party seeking to invalidate a statute on grounds of vagueness must prove that it is unconstitutionally vague beyond a reasonable doubt. *State v. Pittman*, 174 Wis.2d 255, 276, 496 N.W.2d 74 (1993). Courts "indulge every presumption to sustain the constitutionality of a statute." *State v. Wickstrom*, 118 Wis.2d 339, 351, 348 N.W.2d 183 (Ct. App. 1984).

Facing that heavy burden of proof, anyone challenging a statute on vagueness grounds must first show that "'because of some ambiguity or uncertainty in the gross outlines of the conduct prohibited by the statute, persons of ordinary intelligence do not have fair notice of the prohibition ....'" *Pittman*, 174 Wis.2d at 276 (citation omitted). A statute provides fair notice if there is "sufficient warning to one wishing to obey the law that his conduct comes near the prescribed area." *Tronca*, 84 Wis.2d at 86.

The second requirement to invalidate a statute is to prove that those who enforce the laws must create their own standards rather than apply standards set forth in the statutes. *Pittman*, 174 Wis.2d at 276-77. Courts must bear in mind that enforcement of any statute requires judgment, and this fact does not make a statute vague. *Kalt v. Milw. Bd. of Fire & Police Comm'rs*, 145 Wis.2d 504, 512, 427 N.W.2d 408 (Ct. App. 1988). A statute is not vague "'simply because "there may exist particular

instances of conduct the legal or illegal nature of which may not be ascertainable with ease.'" *Pittman*, 174 Wis.2d at 276-77. All that is required is a "'fair degree of definiteness.'" *State v. Courtney*, 74 Wis.2d 705, 710, 247 N.W.2d 714 (1976) (citation omitted). "'[O]ne who deliberately goes perilously close to an area of proscribed conduct'" assumes the risk "'that he may cross the line.'" *Id.* at 710-11 (citation omitted). Therefore, a statute is not vague simply because the boundaries of the prohibited conduct are "somewhat hazy" or that what "is clearly lawful shades into what is clearly unlawful by degree ...." *Id.* at 711.

A person whose conduct is clearly prohibited by the terms of a statute does not have standing to base a vagueness challenge on hypothetical fact situations, since his case represents a permitted application. *Milwaukee v. K.F.*, 145 Wis.2d 24, 34, 426 N.W.2d 329 (1988); *Pittman*, 174 Wis.2d at 278. This is true even where a defendant's first amendment rights are implicated. *K.F.*, 145 Wis.2d at 34. Thus, the only question is whether, on *the facts of this case*, "'one bent on'" obeying § 946.12(3) would be unable to discern that the conduct described in the criminal complaint was near the "region of proscribed conduct." *Courtney*, 74 Wis.2d at 711.

B. Wisconsin Stat. § 946.12(3) is not unconstitutionally vague merely because it requires interpretation.

Section 946.12 reads as follows:

> **946.12 Misconduct in public office.** Any public officer or public employee who does any of the following is guilty of a Class I felony:
>
> **(1)** Intentionally fails or refuses to perform a known mandatory, nondiscretionary, ministerial duty of the officer's or employee's office or employment within the time or in the manner required by law; or

> **(2)** In the officer's or employee's capacity as such officer or employee, does an act which the officer or employee knows is in excess of the officer's or employee's lawful authority or which the officer or employee knows the officer or employee is forbidden by law to do in the officer's or employee's official capacity; or
>
> **(3)** Whether by act of commission or omission, in the officer's or employee's capacity as such officer or employee exercises a discretionary power in a manner inconsistent with the duties of the officer's or employee's office or employment or the rights of others and with intent to obtain a dishonest advantage for the officer or employee or another; or
>
> **(4)** In the officer's or employee's capacity as such officer or employee makes an entry in an account or record book or return, certificate, report or statement which in a material respect the officer or employee intentionally falsifies; or
>
> **(5)** Under color of the officer's or employee's office or employment, intentionally solicits or accepts for the performance of any service or duty anything of value which the officer or employee knows is greater or lesser than fixed by law.

Each subsection of § 946.12 contemplates a different manner in which misconduct in public office may be committed. Section 946.12(3) requires proof that a public officer or employee exercised a discretionary power in a manner inconsistent with his or her duties with the intent to gain a dishonest advantage for himself or another. Wis. JI-Criminal 1732 (1990). Subsection (3) is based in part upon a prior existing statute, § 348.29 (1951) which prohibited public officers from discounting claims or otherwise neglecting their duties.[2] *Judiciary*

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[2] **348.29 Discounting claims; neglect of duty.** Any person mentioned in section 348.28 who shall ... wilfully violate any provision of law authorizing or requiring anything to be done or prohibiting anything from being done by him in his official capacity or employment, or who shall refuse or wilfully neglect to form any duty in his office required by law, or shall be guilty of any wilful

Committee Report on the Criminal Code, Wisconsin Legislative Council at 176 (1953). That statute dealt with the violation of any provision of law authorizing or requiring anything to be done or prohibiting anything from being done in an official capacity. *Id.* Section 348.29 made reference to provisions of "law." The legislature did not include that language in § 946.12(3), whereas it did in §§ 946.12(1), (2) and (5). Thus, in enacting (3) in the form it did, the legislature clearly intended to reach conduct different from the other subsections, conduct that might not in itself be a specific violation of any other statute, but that nonetheless constitutes misconduct in public office.

Petitioners argue § 946.12(3) is vague because there is no specific statute that sets forth the duties of a legislator or legislative aide (petitioners' brief at 16-17). They point to statutes which enumerate certain duties for various types of public officials. While the statutes petitioners cite do set forth some specific duties for particular officials, they are not exhaustive lists of those officials' duties and cannot seriously be argued to be the only duties those officials have.

Since § 946.12 applies to all public officers and employees, many of whom will have different duties, it would be impossible for subsection (3) to list out specific duties for each type of officer or employee. As this court noted in rejecting a challenge to § 946.12(3) as being unconstitutionally vague on its face, "'[t]he fact that statute fails to itemize with particularity every possible kind of conduct which would violate such a statute, does not make it constitutionally vague." *Ryan v. State,* 79 Wis.2d 83, 91, 255 N.W.2d 910 (1977) (citation omitted).

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extortion, wrong or oppression therein shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding five hundred dollars.

Petitioners emphasize that the court of appeals, in its Certification to this court, focused on whether there exists some other statute, aside from § 946.12(3), which establishes an explicit duty to refrain from using state resources to operate campaigns. As discussed in Section II.C.2. below, there are indeed statutes establishing such a duty and that was clearly recognized by the court of appeals in its decision in this case. Regardless, it is not necessary that "duty," as that term is used in § 946.12(3), be explicitly identified in a particular statute.

The fact that a violation of § 946.12(3) can be based upon an act not specifically identified in a statute was made clear in *Tronca,* 84 Wis.2d 68. In that case, three defendants, one of them a Milwaukee alderman, were convicted as parties to the crime of misconduct in public office under § 946.12(3) for soliciting and accepting bribes in exchange for the alderman's support of a liquor license application. *Id.* Defendants in that case challenged their conviction on the grounds that the "discretionary power" exercised by the alderman, his approval of the liquor license, was an informal aldermanic privilege, not a formal discretionary power conferred by statute. *Id.* at 76. This court rejected that argument, finding that the powers of a public official "are not limited to expressly conferred powers but apply to *de facto* powers which arise by custom and usage and which are exercised under the color of office and which, by virtue of the office, tend to have a corrupt influence on public affairs." *Id.* at 80.

If a discretionary power under § 946.12(3) does not have to be specifically defined by statute, then neither does a duty for purposes of that statute. Petitioners try to distinguish *Tronca* by pointing out that *Tronca* involved a challenge to the phrase "discretionary power" not to the word "duty." Petitioners fail to explain why the court's reasoning would not apply equally to both.

Further, *Tronca* is notable for the court's discussion of whether the acts committed in that case were "inconsistent" with the alderman's duties. In finding that

they were, this court looked at two Milwaukee City Ordinances as sources for the duties of common council members. *Tronca,* 84 Wis.2d at 82. One such ordinance prohibited a common council member from voting on any matter in which he may be directly or indirectly interested. *Id.* While the alderman in *Tronca* did not technically violate that ordinance because he did not have any ability to vote on the licensing application at issue, he did agree informally to support the application. The court found this violated the intent of the ordinance and therefore was inconsistent with his duties. *Id.*

Like § 946.12(3), other Wisconsin statutes leave room for interpretation without being rendered vague. The fact that a statute presents questions of statutory construction does not mean that the statute is unconstitutionally vague. *State v. Hahn*, 221 Wis.2d 670, 682, 586 N.W.2d 5 (Ct. App. 1998). If by use of the ordinary process of statutory construction a practical and sensible meaning can be given to the statute, it is not unconstitutionally vague. *Id.* at 677.

For example, Wisconsin's disorderly conduct statute prohibits persons from engaging, in a public or private place, in "violent, abusive, indecent, profane, boisterous, unreasonably loud *or otherwise disorderly conduct* under circumstances in which the conduct tends to cause or provoke a disturbance." Wis. Stat. § 947.01. The statute does not further define "otherwise disorderly conduct," nor does any other statute define that phrase. Nonetheless, this court has held, for example, that this statutory language was not unconstitutionally vague as applied to a defendant's conduct in sending anonymous mailings with disturbing contents to three victims. *State v. Schwebke*, 2002 WI 55, 253 Wis.2d 1, 644 N.W.2d 666.

Wisconsin lacks a statute explicitly prohibiting "mailing of disturbing contents" to others, just as it lacks a statute expressly stating "the use of state resources for private campaigns is prohibited." The legislature is entitled to enact broadly worded statutes to address what it deems to be wrongful activity, whether the activity is a

broad range of disorderly conduct that disturbs others or a broad range of official misconduct that includes the diversion of public resources for private advantage. In enacting § 946.12(3) to prohibit the corrupt exercise of discretionary power "'whether by act of commission or omission,'" the legislature clearly prescribed a broad scope of conduct which could be misconduct in public office. *Tronca*, 84 Wis.2d at 81.

The interpretation required for § 946.12(3) is simply no different from that required for many other statutes. *See, e.g., State v. McCoy*, 143 Wis.2d 274, 286-88, 421 N.W.2d 107 (1988) (though phrase "'imminent physical harm'" in § 946.715 is not defined, and the phrase did not appear in any other place in Wisconsin statutes, common usage and understanding of words provides reasonable notice); *State v. Armstead*, 220 Wis.2d 626, 583 N.W.2d 444 (Ct. App. 1998) (terms "adequate treatment," "depreciate the seriousness of the offense," and "necessary to deter the child or other children," contained in Wis. Stat. § 970.032(2)(a)-(c) are "fairly definite" and not unconstitutionally vague). Wisconsin's official misconduct statute is designed to operate in a flexible manner, in the same way that many other criminal statutes operate.

Petitioners invite this court to search for ambiguity, which is not the purpose of statutory interpretation. *State v. Hamilton,* 2003 WI 50, ¶38, 261 Wis.2d 458, 661 N.W.2d 832. As shown above, many statutes require significant interpretation of a statutory word or phrase; this does not make the statutes vague. Decisions by this court and the court of appeals interpreting the official misconduct statute, as well as the pattern jury instructions for this statute, allow for such interpretation of the term "duties."

In *State v. Schwarze*, 120 Wis.2d 453, 355 N.W.2d 842 (Ct. App. 1984), the circuit court instructed the jury that the defendant, a school district accounts receivable clerk, had a duty under § 946.12(3) to disclose shortages

of money to her employer. The court of appeals held that the existence of a duty is a question of law. *Id.* at 455. Therefore, it was proper for the circuit court to instruct the jury that such a duty existed. *Id.* at 456. Petitioners here fail to provide any basis to distinguish *Schwarze* from this case.

Additionally, the pattern jury instruction for § 946.12(3), Wis. JI-Criminal 1732, specifically instructs the court to fill in the blank regarding a defendant's duty:

> The third element requires that the defendant exercised a discretionary power in a manner inconsistent with (the duties of his office) (the duties of his employment) (the rights of others). As a (position), it was defendant's duty to _____.

Petitioners point to the notes of Wis. JI-Criminal 1732 which indicate that for purposes of instructing on the defendant's duty, the court should fill in the duty imposed by statute. Wis. JI-Criminal 1732 n.5. To the extent that the jury instructions are suggesting that only a statutory duty can form the basis of a violation of § 946.12(3), those instructions are incorrect. As already discussed above, § 946.12(3) does not refer to a statutory duty and in *Schwarze* the court identified a duty based upon common law principles of agency.

Petitioners cite to *State v. Popanz,* 112 Wis.2d 166, 332 N.W.2d 750 (1983), to support their argument that because there is no statutory definition for the word "duty" in § 946.12(3), the statute is rendered unconstitutionally vague. As already discussed, numerous statutes contain phrases that are not specifically defined, yet they are not considered unconstitutionally vague. Section 946.12(3) is one of them. *Tronca*, 84 Wis.2d 68. *See also Ryan,* 79 Wis.2d at 91 (elements of § 946.12(5) while broad are not unconstitutionally vague).

Further, *Popanz* actually undercuts petitioners' argument. In that case, the defendant challenged his conviction for failing to send his children to either a

public or a private school on the ground that the statute was unconstitutionally vague because it did not define "private school." *Popanz,* 112 Wis. 2d at 172. In attempting to uphold the constitutionality of the statute, the court searched statutes, administrative rules and regulations and state agency writings for a definition of "private school." *Id.* at 174. Finding none, the court held the statute was unconstitutionally vague. *Id.* at 177. It follows from this that a statutory term can be identified not only in the statutes themselves but in other sources as well. This is consistent with the comments to § 946.12(1) by the Wisconsin Legislative Council. Those comments indicate that the duty contemplated in 946.12(1) can be imposed by "common law, statute, municipal ordinance, administrative regulation, and perhaps other sources." *Judiciary Committee Report on the Criminal Code* at 175.[3]

In the instant case, the state is able to point to several sources of petitioners' duty to refrain from using state resources to operate political campaigns, any one of which would be sufficient to sustain charges of public misconduct: (1) the duty long established in Wisconsin law of conflict-free loyalty to the public; (2) chapters 11, 12 and 19 and other relevant statutes detailed below; and (3) the Assembly's rules prohibiting such activity.

Petitioners devote numerous pages in their brief to cases from other jurisdictions which they believe support their argument that § 946.12(3) is unconstitutionally vague as applied in this case. Aside from the obvious fact that such cases are not binding precedent in Wisconsin, petitioners' reliance on these cases is misplaced because they do not support petitioners' position.

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[3]Appellants criticize the court of appeals' reliance on this comment since it pertains to § 946.12(1). Appellants acknowledge that § 946.12(3) encompasses even broader conduct than (1) yet they fail to explain why the sources of the duty for (3) could not stem from at least the same sources as (1).

Petitioners first cite *State v. DeLeo*, 356 So.2d 306 (Fla. 1978), in which the Florida Supreme Court determined that one section of the Florida misconduct statute was unconstitutionally vague. That section made it a crime for a public servant to knowingly violate or cause another to violate any statute or lawfully adopted regulation or rule relating to his office with the corrupt intent to obtain a benefit for himself or another. *Id.* at 307. The court later struck down a separate provision of the misconduct statute on the same grounds in *State v. Jenkins,* 469 So.2d 733 (Fla. 1985), also cited by petitioners. In that case, the section of the misconduct statute made it a crime for a public servant to knowingly refrain, or cause another to refrain, from performing a duty imposed upon him by law with the corrupt intent to obtain a benefit for himself or another. *Id.* Both of those decisions are unavailing to petitioners in that the Florida Supreme Court struck down the misconduct statute as vague on its face.

This court has already determined that § 946.12(3) is not unconstitutionally vague. *State v. Tronca,* 84 Wis.2d at 87. Even though the focus in *Tronca* was on the phrase "discretionary power," this court found that § 946.12(3) "read reasonably in its entirety, clearly gives notice of the nature of the penalties and the applicability of the statute to the conduct engaged in by the defendants." *Id.* Petitioners attempt to distinguish *Tronca* on the grounds that it involved an as applied vagueness challenge. That makes no difference in defeating the Florida cases cited by petitioners. Those cases involved facial challenges to the statutes at issue. Since this court has determined that § 946.12(3) is not unconstitutionally vague as applied in a particular case, then by necessity it cannot be unconstitutionally vague on its face.

For the same reason, petitioners' reliance on *People v. Beruman,* 638 P.2d 789 (Colo. 1982), and *State v. Adams,* 866 P.2d 1017 (Kan. 1994), is misplaced. Further, the *Adams* case is distinguishable in that the Kansas statute defined misconduct in a circular fashion,

stating that official misconduct included "[w]illfully and maliciously committing an act of oppression, partiality, misconduct or abuse of authority...." *Id.* at 1019. In other words, a defendant was guilty of official misconduct if he engaged in misconduct. The Kansas statute did not provide any further clarification of what constituted misconduct.

In contrast, § 946.12(3) defines misconduct much more specifically in that it requires a defendant to have exercised a discretionary power in a manner inconsistent with the duties of his office with intent to gain a dishonest advantage for oneself or another. While the elements of this offense are broadly drawn, they are not unconstitutionally vague.

Without discussion, petitioners also cite to a string of cases from other states to suggest that misconduct statutes can only be upheld if "the duty" alleged to have been violated is specifically defined by statute (petitioners' brief at 23-24). Many of these cases do not support the proposition put forth by petitioners. For example, in *Commonwealth v. Manlin,* 411 A.2d 532 (Pa. 1979), a deputy warden convicted of official oppression for mistreating inmates challenged his conviction on the grounds that "mistreatment" was not defined and therefore the statute was unconstitutionally vague. *Id.* Duty was not an element of the statute and the element at issue, "mistreatment," was the subject of the defendant's vagueness challenge specifically because it was not defined by statute. The Superior Court of Pennsylvania rejected this argument, finding that although "mistreatment" was not defined by statute, it is equated with abuse and has a commonly understood meaning. *Id.* at 533-34.

In *Cook v. State,* 353 S.E.2d 333 (Ga. 1987), the Georgia Supreme Court found that the malpractice in office statute was not unconstitutionally vague just because it did not specify a particular penalty. *Id.* at 336. There is no discussion whatsoever about the elements of

that statute in that decision and it is unclear in the decision whether the term duty was even used in the statute. Regardless, the court was looking at the penalty provision, not the definition of the elements.

Even if these cases cited by petitioners stand for the proposition that official misconduct statutes are constitutional when duties are specifically defined by statute, it does not follow that the statutes which do not define duties are therefore unconstitutional.

Petitioners ignore cases in Wisconsin and other states that have upheld the constitutionality of misconduct statutes which contain terms that are not specifically defined by statute. This court in *Ryan* determined that § 946.12(5) is not unconstitutionally vague, finding that while written broadly the elements were not so broad as to render the statute unconstitutionally vague. *Ryan,* 79 Wis.2d at 91. Included in those elements was the performance of "any service or duty." Thus, this court has already determined that the phrase "duty" is not unconstitutionally vague in the context of § 946.12.

Other states have reached similar conclusions. The Oregon Supreme Court rejected a vagueness challenge to a provision of the Oregon misconduct statute which is similar to § 946.12(3). *State v. Florea,* 677 P.2d 698 (Or. 1984). The Oregon provision makes it a crime for a public servant to knowingly perform an act constituting an unauthorized exercise in his official duties if done with intent to obtain a benefit or to harm another. *Id.* at 700. The defendant in that case challenged his conviction for misconduct on the grounds that the term "official duties," was not defined and therefore vague. *Id.* The court rejected this argument. *Id See also State v. Andersen,* 370 N.W.2d 653, 662-63 (Minn. Ct. App. 1985) (misconduct statute not unconstitutionally vague merely because "lawful authority" derives meaning from set of rules not contained in statute itself or because "forbidden by law" does not require that conduct be forbidden by particular penal statute); *People v. Kleffman,* 412 N.E.2d

1057, 1060-61 (Ill. App. Ct. 1980) (misconduct statute which does not define terms "lawful authority" or "personal advantage" not unconstitutionally vague); *Margraves v. State*, 34 S.W.3d 912, 921 (Tex. Crim. App. 2000) (misconduct statute which prohibits misapplication of government property not vague in conviction of public official who used university airplane for private use).

Regardless, as already discussed above, this court has upheld the constitutionality of the misconduct statute even though particular phrases such as "discretionary power" are not specifically defined. Further, § 946.12(3) is not unconstitutionally vague as applied in this case because the duty that petitioners violated in this case is clear.

C. Petitioners had adequate notice that they had a duty, as contemplated by § 946.12(3), to refrain from using state employees and resources to conduct private campaign activity.

The duty that petitioners are charged with violating was the duty to refrain from using public resources to operate private ventures such as private election campaigns.

In arguing that a reasonable person could not be expected to know that a public official or employee has a duty to refrain from using state time and resources to operate private election campaigns, petitioners assert that the vagueness of the official misconduct statute is somehow exposed by the fact that the state and the courts continually point to additional sources that identify a public official's duty to refrain from conducting campaigns using state resources. That the sources are ubiquitous only demonstrates the weakness of petitioners' vagueness challenge, not its strength. Further, as stated by the court of appeals, "[t]he defendants cite no authority for the proposition that we are restricted to an exclusive

statute or one exclusive source to ascertain his or her duty." (Slip op. at 8, ¶ 17).

Petitioners also contend that the sources of this duty identified by the court of appeals are inapplicable. This court is not confined to the sources of a public official's duties cited by the court of appeals or identified in the criminal complaint in determining whether the statute provides sufficient notice to survive a vagueness challenge. Therefore, in addition to addressing the sources of petitioners' duties identified by the court of appeals and addressed in petitioners' brief, the state discusses other sources of the duty to refrain from hiring and directing employees to conduct private election campaigns using state funds and resources.

1. Petitioners had a clear fiduciary duty to the public to refrain from using taxpayer dollars to run private political campaigns.

One source of petitioners' duty to refrain from using state employees and resources for private campaigns stems from the fiduciary nature of their positions as public officials and public employees. This fiduciary duty has long been recognized in Wisconsin: A public employee may not use public property for private gain. *Milwaukee v. Drew*, 220 Wis. 511, 518, 265 N.W. 683 (1936). A legislator violates her fiduciary duty as a public official by, for example, representing a private party before a government agency. *State v. Catlin*, 2 Wis.2d 240, 249-50, 85 N.W.2d 857 (1957) (acting in dual roles of legislator and attorney for client compromises requirement that legislator act only "in what he conceives to be the public interest"; even full disclosure would not overcome conflict). "A public office is created by law, not for the benefit of the officer but for the public." *State ex rel. Duesing v. Lechner*, 187 Wis. 405, 409, 204 N.W. 478 (1925).

This long-standing duty has been recognized as a duty for purposes of § 946.12(3). In *Schwarze*, for example, the court held that a school district employee had a duty to report shortages of public money, under the theory of master (the public) and servant (the public employee). 120 Wis.2d at 456. The defendant in *Schwarze* did not steal these public funds herself. Instead, she became aware that they had been stolen, and failed to exercise the discretionary authority of her official position to disclose the shortages to her superior. In failing to make full disclosure of material facts bearing on her official responsibility, the public employee placed her personal interest in protecting the thief above her official duties to the public, in violation of § 946.12(3).

Relative to *Schwarze,* this case presents an even more obvious duty in that it is axiomatic that public officials and employees cannot covertly funnel taxpayer dollars into private ventures such as election campaigns.

Courts from other jurisdictions have also upheld misconduct charges based on an official's breach of his fiduciary duty to the public. For example, in *People v. Scharlau*, 565 N.E.2d 1319, 1323 (Ill. 1990), elected city commissioners were charged under an official misconduct statute which provided that a public officer commits misconduct when that official performs an act "in excess of his lawful authority" to "obtain a personal advantage for himself." The commissioners had negotiated a settlement in a voting rights action which established a transition period during which the commissioners would remain employed by the city for three years at a salary they themselves determined. *Id.* at 1321.

The Illinois Supreme Court held that, in securing for themselves the three-year terms of employment, the commissioners exceeded the scope of their authority and could be properly charged for official misconduct:

> Defendants had a duty to act in the best interests of the city. They also had a duty to refrain from using their positions as city commissioners for personal

> benefit. We agree that the defendants' settling the lawsuit was within their lawful authority. We find, however, that defendants' arranging for their own employment for a fixed term and salary was outside that authority. Public officials are expected to adhere to the highest standards of ethical conduct.

Id. at 1326. Here, each petitioner is alleged to have covertly used his or her official position for personal benefit, namely, to directly operate private campaigns with which they were associated.

As stated in *State v. Maiorana*, 573 A.2d 475, 479 (N.J. Super. 1990), a New Jersey criminal case involving alleged misconduct in office:

> When constructing statutes which prescribe the duties and obligations of public officials, it is a practical impossibility to spell out with specificity every duty of the office, and therefore courts take judicial notice of the duties which are inherent in the very nature of the office.

See also United States v. Lopez-Lukis, 102 F.3d 1164, 1169 (11th Cir. 1997) (public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest); *State v. Weleck*, 91 A.2d 751, 756 (N.J. 1952) ("Duties may be imposed by law on the holder of an office in several ways: (1) they may be prescribed by some special or private law ...; (2) they may be imposed by a general act of the Legislature ...; or (3) they may arise out of the very nature of the office itself.") (citations omitted); *State v. Deegan*, 315 A.2d 686, 695 (N.J. Super. 1974) (citation omitted) ("'These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office.'"); *State v. Parker*, 592 A.2d 228, 235 (N.J. 1991) (official misconduct statute does not require that the underlying act be criminal in nature).

Thus, petitioners were bound by a well-established fiduciary duty to the public to use public funds only on behalf of the public and not on behalf of private political campaigns.

2. The duty to refrain from using state resources for private campaigns has been codified by the Legislature.

Even though petitioners' duty to refrain from using state resources for private purposes was not required to be set forth by statute, that duty is repeatedly set forth in the statutes and the Assembly's own rules.

a. Statutory provisions prohibit the conduct petitioners engaged in.

The Legislature has enacted numerous statutory provisions that prohibit the use of state resources for private campaigns.[4]

While no one statute contains an express statement using the words "conducting political campaigns on state time using state resources is prohibited," the statutes taken together in effect produce that result. These statutes regarding campaign financing, prohibited election practices, and the duties of public officials demonstrate unequivocally that legislators act inconsistently with their official duties when they run private political campaigns using state resources or hire others to do so.

A campaign for office in Wisconsin is a private, regulated venture, not a function of legislative authority. A collective reading of chapters 11, 12 and 19 exhibits a legislative intent to keep political campaigns well-

[4]For the court's convenience, the state has included the text of these statutes in its appendix (R-Ap.).

regulated and distinct from the work public officials are required to perform. These statutes are premised on a policy that in a democracy, citizens elect public officials to act for the common good; public officials may not treat the public's resources as their own in operating private campaigns.

Restrictions on the financing of election campaigns have long existed in Wisconsin. For example, in *State ex rel. Orvis v. Evans,* 229 Wis. 304, 282 N.W.14 (1938), this court examined campaign finance laws to determine whether a disbursement by a candidate of mirrors and match containers for political purposes would render an election for a municipal court judge null and void.

The current campaign financing restrictions are contained in chapter 11, enacted in 1973. Ch. 334, Laws of 1973. As expressly stated therein, one of the purposes of chapter 11 is to "enable candidates to have an equal opportunity to present their programs to voters" and to ensure that the true source and extent of support for a candidate is fully disclosed. Wis. Stat. § 11.001(1) (R-Ap. 108). The legislature has also made a policy determination that in order "to ensure fair and impartial elections," officeholders are "preclud[ed] ... from utilizing the perquisites of office at public expense in order to gain an advantage over nonincumbent candidates who have no perquisites available to them." Wis. Stat. § 11.001(2) (R-Ap. 108).

Clearly, Jensen and Foti were circumventing the entire purpose of chapter 11 by using the perquisites of their offices at public expense in order to gain an advantage over nonincumbent candidates in their own campaigns and in the campaigns of other candidates. Schultz knowingly helped them to do so.

Petitioners' conduct conflicts directly with several specific prohibitions found in chapter 11. Section 11.36(1) precludes any person from soliciting services for political purposes from any state employee

who is engaged in his or her official duties (R-Ap. 149). Jensen and Foti solicited Schultz and other ARC employees to perform services for political purposes while engaged in their official duties by directing them to engage in campaign activity using state computers, supplies and office space during hours when the ARC offices were open to the public.

Sections 11.36(3) and (4) expressly prohibit the use of state offices for the solicitation or collection of campaign contributions (R-Ap. 149). Here, Foti and Jensen hired and supervised Schultz to use Jensen's and Foti's offices, offices in the capitol annex, and offices at the ARC to conduct campaign fundraising and other private campaign activities (1:13; R-Ap. 113). In addition to the facts set forth above, the complaint alleges that lobbyists dropped off contribution checks at the Foti capitol office, stating words to the effect of "This needs to get to Sherry [Schultz]" (1:14; R-Ap. 114). Schultz had ARC graphic artists designing and preparing fundraising invitations (1:16; R-Ap. 116). She was the person legislators and staff at the ARC came to for fundraising materials and she spearheaded fundraising efforts for the Republican Assembly Campaign Committee (*id.*). In addition to soliciting campaign contributions herself, Schultz had ARC employee, William Cosh, doing the same (1:20; R-Ap. 120). Jensen expected Schultz to make fundraising calls and raise money for specific campaign races (*id.*). Jensen himself made fundraising calls from his office and brought in campaign checks for his staff to enter into a database (1:35-36, 38; R-Ap. 135-36, 138). He was aware that his staff stuffed envelopes with fundraising letters in his office (1:35; R-Ap. 135). Foti, too, brought in campaign contributions for his staff to keep track of (1:14; R-Ap. 114).

Numerous other provisions in chapter 11 demonstrate the legislature's determination that state resources cannot be used for campaign activity. Even in instances in which these provisions do not apply on their face, they nevertheless provide further notice to

petitioners that using ARC staff and resources for private campaigns was inconsistent with their duties. For example, § 11.37 restricts use of state vehicles for campaign purposes (R-Ap. 150). It would be absurd to prohibit the use of state vehicles if all other state resources were fair game for use by a public official in pursuing private campaign operations.

Petitioners Jensen's and Foti's conduct also fits within the literal terms of § 12.07(4), which prohibits making state employment contingent on the performance of campaign activities (R-Ap. 151-152). Foti and Jensen hired Schultz specifically for that purpose (1:7; R-Ap. 107).

In addition to the long-standing restrictions found in chapters 11 and 12, petitioners' duty to refrain from using state resources for private campaign activity is also articulated in chapter 19. That chapter is a logical place to look in determining one's duties under § 946.12(3) since it is entitled, "General Duties of Public Officials," and specifically, the "Code of Ethics." This is where one "bent on obedience" to the law would logically look first.

Section 19.46(1)(b) specifically states that "no state official may ... (b) [u]se his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for ... an organization with which the official is associated." (R-Ap. 156).

Similarly, § 19.45 states, in relevant part:

> (2) No state public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself ..., or for an organization with which he or she is associated. ...
>
> ....
>
> (5) No state public official may use or attempt to use the public position held by the public

> official to influence or gain unlawful benefits, advantages or privileges personally or for others.

(R-Ap. 155).

Under these statutes, petitioners had a duty to refrain from using their offices to assist private political campaigns and organizations such as Taxpayers for Jensen and the Republican Assembly Campaign Committee. Petitioners' actions clearly violated the duties established by these statutory provisions.

Section 19.45(1) reaffirms the clear common law of all public officials' duties to act on behalf of the public rather than for personal gain:

> (1) The legislature hereby reaffirms that a state public official holds his or her position as a public trust, and any effort to realize substantial personal gain through official conduct is a violation of that trust. This subchapter does not prevent any state public official from accepting other employment or following any pursuit which in no way interferes with the full and faithful discharge of his or her duties to this state.

(R-Ap. 154-155).

Petitioners violated the public trust by using their positions as state legislators and employees for substantial personal gain rather than for the public good. They similarly had a duty under § 19.41(1) to "avoid conflicts between their personal interests and their public responsibilities," which they violated by using their public offices for their personal interests in reelecting themselves and other targeted candidates (R-Ap. 153).

Petitioners' vagueness challenge rests on the assumption that in interpreting what their duties as public officials are under § 946.12(3), and deciding whether their actions might be inconsistent with such duties, those bent on obedience could not be expected to consider chapters of the Wisconsin Statutes such as "General Duties of

Public Officials" (chapter 19) and the Code of Ethics contained in that chapter; "Campaign Financing" (chapter 11); or "Prohibited Election Practices" (chapter 12). This argument should fail. Any reasonable public official or employee attempting to determine what his or her "duties" are as contemplated by § 946.12(3) would believe that, at the very least, it encompassed the requirements set forth in the "General Duties of Public Officials" and the Code of Ethics. Reasonable persons wondering whether conducting campaign activities on state taxpayer dollars would be "inconsistent with the duties of his office or employment" under § 946.12(3) would reasonably look to "Campaign Financing" (chapter 11) and "Prohibited Election Practices" (chapter 12) for guidance. Petitioners' arguments, though couched in terms of vagueness, amount to nothing more than an assertion that "I didn't know it was against the law," or at least against this particular law, a claim that is unavailing in a court of law, and in any case is belied by the allegations in the complaint.

These statutory provisions, taken individually and collectively, provided adequate notice to petitioners that they had a duty to refrain from using state employees and resources for private election campaigns.

Petitioners challenge the court of appeals' consideration of these provisions in identifying their duties. They first argue, without explanation, that the court of appeals ignored the rule of lenity and interpreted § 946.12(3) in favor of the prosecution. Just because the court of appeals rejected petitioners' arguments does not mean that the court erred in its interpretation of the statute. While penal statutes must be construed in favor of the accused, it is equally true that a statute cannot be construed in disregard of the purposes of the statute. *Tronca,* 84 Wis.2d at 80 (citation omitted).

Petitioners next argue that when § 946.12(3) was enacted in 1953, chapters 11, 12 and 19 did not exist in anything resembling their present form, and therefore,

there can be no assumption that § 946.12(3) be read in conjunction with these chapters. However, the statutory provisions discussed above served to codify and clarify the common law fiduciary duties that public officials owe the public they serve. As stated in § 19.45(1) "The legislature hereby *reaffirms* that a state public official holds his or her position as a public trust, and any effort to realize substantial personal gain through official conduct is a violation of that trust." (R-Ap. 154-155). In other words, the statutes reaffirm, rather than create, the duties public officials owe the public and specifically delineate the various ways an official may violate the public trust.

Even if in enacting the provisions of these chapters the legislature created new duties, this does not mean those duties may not be incorporated into the misconduct in public office statute. Indeed, the fact that § 946.12 existed prior to certain specific provisions of chapters 11, 12 and 19 undercuts petitioners' arguments. In drafting the misconduct statute in the way that it did, the legislature obviously recognized that the duties of public officers could not be specifically enumerated because they would differ among public officials depending on their positions. Moreover, the duties of a particular class of public officials or employees could change substantially over time. Presumably, the legislature would have contemplated that any duties articulated in subsequent statutes (or legislative rules, for that matter) would be incorporated into the term "duties" in the official misconduct statute. These duties include both duties to refrain from certain behavior as well as duties to engage in certain behavior. Section 946.12(3) cannot reasonably be interpreted to only include those duties that existed at the time of its enactment.

b. The Assembly further emphasized that state resources cannot be used for private campaign activity.

Consistent with the statutory provisions described above, the Assembly took numerous steps to remind its members and employees of their duty to refrain from using state resources for private campaigns. The complaint alleges that on February 27, 1997, an e-mail was sent to "All Assembly; All Senate" from Wisconsin State Representative Ben Brancel, which admonished:

> An e-mail message of a political nature was inadvertently sent by a new Assembly employee today.
>
> This serves as a reminder to all Legislative staff that political activity, whether partisan or non-partisan is not permitted during working hours. Furthermore, all state owned facilities, office equipment, including the electronic mail system, and all other state owned supplies and materials are **strictly prohibited** from use for a political purpose anytime. This means both use during and after business hours.
>
> Citizenship rights to political activity and community involvement must be exercised on non-office time and equipment.

(1:5-6; R-Ap. 105-106). A similar e-mail was sent out each year by the Assembly Chief Clerk (1:6; R-Ap. 106).

The prohibition on using state resources for campaign activity is also contained in the Assembly Employe Handbook, which was admitted at the preliminary hearing:

> Political activity is not permitted during working hours. State owned facilities, office equipment, supplies, etc., may not be used for political purposes anytime. Citizenship rights to political activity and

> community involvement must be exercised on non-office time.

(32:Ex. 7 at 4; R-Ap. 160). Also admitted at the preliminary hearing was a memo from the Assembly Chief Clerk, dated May 16, 2000, which was distributed to legislators and staff. That memo specifically stated:

> Employees should not engage in a campaign activity:
>
> (a) With the use of the state's supplies, services, or facilities not available to all citizens;
>
> (b) During hours for which he or she is compensated by the State of Wisconsin;
>
> (c) At his or her office regardless of whether the activity takes place during regular office hours.

(32:Ex. 9 at 2; R-Ap. 174). The memo then goes on to describe campaign activities that are precluded, such as addressing/labeling materials for a campaign activity, or soliciting or receiving campaign contributions (*id.*). The memo also informs legislators and employees that they should not use state telephone equipment for campaign activity (*id.*).

Thus, the Assembly Employe Handbook, memos and e-mails from the Chief Clerk, and the e-mail from the former speaker, all of which summarize the statutory prohibitions described above, are unequivocal: using state offices, state supplies, or state employees on state time for campaign activities is prohibited.

Ignoring these multiple, consistent sources that prohibit the use of state resources for private campaign activities, petitioners imply that Jensen and Foti had an affirmative duty to use state resources for campaign activity under State of Wisconsin Assembly Rules 2 and 3 (1997) (17:7-9) and duties that have "developed historically" or which have been "imposed by custom and routine practices." (Petitioners' brief at 17). Petitioners

claim the court of appeals specifically rejected these rules and the duties imposed by history and custom (petitioners' brief at 1, 17). In fact petitioners never discussed them in the court of appeals. Petitioners also fail to articulate what duties have developed "historically" or by "custom and routine practices."[5]

Furthermore, petitioners' brief summary of the content of Assembly Rules 2 and 3 is misleading (petitioners' brief at 17) (17:7-9). Assembly Rule 2(1) actually states that the majority and minority party leaders "shall perform the duties assigned to them by their respective caucuses, by legislative rule, and by law." (17:7). Likewise, Assembly Rule 3(1)(s) states that the Assembly speaker shall "[p]erform any other duties assigned to the office of speaker by law, legislative rule, directive of the assembly, or custom." (17:9). Thus, these rules incorporate other duties imposed by Assembly rules and by statutes. They do not require use of state resources for private campaigns in violation of the law.

In arguing that the court of appeals wrongly overlooked Rules 2(l) and 3(s), petitioners implicitly argue that all legislators and legislative aides have an affirmative duty to operate political campaigns with state resources in order "to promote and advance the legislative agenda and the elections of like-minded legislators" (petitioners' brief at 5) (17:7-9). "Like-minded legislators" must include themselves since Count Four of the complaint alleges that Jensen hired and supervised state employees to work on his own campaign.

Petitioners' suggestion that their conduct was part of their official duties as legislators or a legislative aide is illogical, based on faulty assumptions about their

[5]The fact that appellants' conduct had been ongoing for some time does not make it legal. *See, e.g., State ex rel. Reynolds v. Dinger,* 14 Wis.2d 193, 204, 109 N.W.2d 685 (1961) (violation of law does not attain legality by lapse of time).

constituents, and only reinforces the conclusion that the charged conduct falls within the terms of § 946.12(3).

First, petitioners fail to demonstrate how spending taxpayer money to run private campaigns can be an affirmative duty of legislators and their publicly-funded aides, when there are so many prohibitions of such conduct, through internal rules, the provisions of chapters 11, 12 and 19, and through an advisory opinion of the Wisconsin Ethics Board (32:Ex. 8; R-Ap. 183-187). Certainly, petitioners cannot claim a duty to engage in conduct that has been expressly prohibited by statutory provisions and by their own internal rules. Nor do petitioners explain why, according to the complaint, they formerly believed that such conduct was improper.

Moreover, simply because Jensen and Foti took on the additional responsibility of leadership roles does not mean they were entitled to hire and supervise state employees to run campaigns any more than any other legislator would be. If the conduct is prohibited as an abuse of power, it is all the *more* important that the most powerful are restrained.

In addition, petitioners' argument is premised on peculiar assumptions about their constituents. First, it assumes that constituents would condone use of their taxes to pay for the campaign operations of persons whom "leadership" has decided should be in the legislature, people who are not necessarily known to those constituents and may not even be in their voting districts. It also assumes that these citizens would be just as happy to have their elected representatives use public money to operate private political campaigns on behalf of others or themselves as do an honest day's legislative work.

Petitioners' argument further assumes that a legislator's constituency is a static entity, and that once constituents elect a certain legislator, they favor that legislator and his or her policy agenda in perpetuity. However, constituencies can change and so can their opinions of their elected officials, which is why legislators

are elected to finite terms of office and are subject to re-election. Therefore, an incumbent legislator cannot justify using state resources to work on his own campaign or the campaigns of "like-minded" individuals as being in the interest of his constituency.

A legislator's use of state resources for private campaign activity is in any case a secret use of public funds that corrupts the democratic process. The statutes relied upon here by the state recognize that incumbents who use the panoply of state resources that are available to them, but not to non-incumbents, in conducting political campaigns have an unfair advantage, thus distorting the political process.

It simply cannot seriously be argued that in light of the laws and rules prohibiting the charged conduct, petitioners had a duty to engage in it. Nor can it be seriously argued that state legislators are unable to draft, promote, support and pass legislation, which are their duties as legislators, without using state employees to operate political campaigns on state time, using state resources.

Notwithstanding their reliance on Assembly Rules 2(l) and 3(s), petitioners complain that a legislative rule cannot be the basis for a duty under § 946.12(3) (petitioners' brief at 17) (17:7-9). If a court may look to common law to establish a duty on the part of an employee to report money shortages to her employer as in *Schwarze*, a court may certainly look to explicit Assembly rules in determining a representative's or a legislative aide's duties. Likewise, in *Tronca,* this court found that the "discretionary power" contemplated in § 946.12(3) could include not only those powers conferred by statute or written policy, but also those *de facto* powers arising out of custom and usage. *Tronca,* 84 Wis.2d at 77-80. If a discretionary power can be identified based upon something other than an official statute, then so might a duty.

Petitioners assert that the use of the Assembly rules as a basis for defining their duties is prohibited under *State v. Dekker*, 112 Wis. 2d 304, 332 N.W.2d 816 (Ct. App. 1983), and the court of appeals' reliance on those rules constituted improper retroactive statutory interpretation. Petitioners' argument is unpersuasive. *Dekker* did not involve a constitutional challenge to the misconduct statute. *Dekker* also did not involve § 946.12(3). Rather, the court of appeals in that case upheld dismissal of a criminal complaint charging police officers with failing to provide first aid in violation of Wis. Stat. § 946.12(1), a subsection not at issue here. Subsection (1) of § 946.12 makes it a crime to fail to perform a mandatory duty within the time or in the manner required by law. The court found that a departmental rule to provide first aid was discretionary, rather than mandatory and therefore could not be the subject of a misconduct charge under Wis. Stat. § 946.12(1).

In contrast, in this case § 946.12(3) is charged, which does not require that the duty be mandatory or established "by law." Petitioners recognize the distinction between subsection (1) at issue in *Dekker* and subsection (3) charged here (petitioners' brief at 28). Necessarily implicit in that recognition is an acknowledgement that *Dekker* is distinguishable from this case. Thus, petitioners' argument that *Dekker* was controlling precedent at the time of the alleged conduct is unsupportable and their argument regarding retroactive statutory interpretation fails.

In addition, their argument fails because this is not a retroactive interpretation of a statute as contemplated by the authority petitioners rely on, *Elections Board of the State of Wisconsin v. Wisconsin Manufacturers & Commerce*, 227 Wis.2d 650, 597 N.W.2d 721 (1999). In that case, this court held that the Elections Board had engaged in "retroactive rule-making" by creating a "new" definition of "express advocacy" that was broader than

that articulated in binding precedent at the time the defendants placed the ads. *Id.* at 681.

Unlike in *Elections Board*, in the instant case, petitioners could not reasonably have relied to their detriment on well-established authority indicating that their conduct was lawful. Nor does this court need to adopt a new definition of duty or engage in a novel reading of the campaign laws to determine that petitioners had a duty to refrain from using public resources to operate private political campaigns. These duties stem from existing legal standards, statutes and Assembly rules. And while petitioners urge that they had no notice of these duties, this assertion is belied by their own admissions and actions in attempting to conceal their conduct. *Elections Board* is therefore unavailing to petitioners.

Moreover, under petitioners' theory of retroactivity, any time a court engages in statutory interpretation, and there is no case directly on point, the court is retroactively applying that statute, in violation of the constitution. As demonstrated by the numerous appellate decisions interpreting statutes, statutory construction does not equate to an unconstitutional retroactive application of that statute.

Resorting to scare tactics, petitioners' claim that allowing the prosecution to go forward in this case "opens the floodgates for wholesale and selective prosecution of government employees and officials." (Petitioners' brief at 30). Petitioners fail to explain how this might be so. Government employees and officials may only be prosecuted under § 946.12(3) if they exercise a discretionary power in a manner inconsistent with their official duties with the intent to gain a dishonest advantage for themselves or others. Section 946.12 has withstood vagueness challenges in the past with no such flood of prosecutions ensuing. A finding that the statute is not unconstitutionally vague as applied in this case will have no different result.

In light of the clear prohibitions discussed above and petitioners' demonstrated awareness of the illegality of their conduct, their claim that they had inadequate notice of their duty to refrain from conducting campaign activities on state time using state resources is implausible.

D. Petitioners failed to establish that those who enforce and apply § 946.12(3) are not able to do so without creating or applying their own standards.

For the same reasons set forth above, petitioners have also failed to establish the second prong of the test for vagueness, that those who enforce and apply § 946.12(3) would not be able to do so in this case without creating or applying their own subjective standards. *Pittman*, 174 Wis.2d at 276-77. In light of the clear authority prohibiting petitioners' conduct, there is no need to apply subjective standards here.

Petitioners provide no reasonable alternative to the state's interpretation of § 946.12(3). Apparently, their view is that legislators and legislative staffers are simply not subject to § 946.12(3), since, under that statute, they do not consider themselves bound by any fiduciary duty, the Code of Ethics for state officials or related provisions. If a legislator commits a separate crime, such as accepting a bribe in violation of § 946.10(2), there is no need for the existence of § 46.12(3) to create duplicative liability. Petitioners simply read § 946.12(3) out of the law.

Petitioners' interpretation would also nullify other statutes that apply to public officials, such as Wis. Stat. § 946.10(1), which prohibits bestowing any property or personal advantage on a state official to intentionally induce a state official "to do or omit to do any act in violation of the officer's ... lawful duty ...." "Lawful

duty" is not defined in § 946.10. Under petitioners' approach, courts lack a standard to determine when a legislator might have a lawful duty to do or refrain from doing anything.

For all of the reasons stated above, petitioners have failed to establish that § 946.12(3) is vague as applied to their conduct.

III. PETITIONERS' OVERBREADTH CHALLENGE FAILS BECAUSE THE ISSUE HAS ALREADY BEEN DECIDED ADVERSELY TO THEM IN *TRONCA*, THE OFFICIAL MISCONDUCT STATUTE DOES NOT REGULATE SPEECH, AND PETITIONERS CANNOT SHOW BEYOND A REASONABLE DOUBT THAT THE CHARGED VIOLATIONS OF § 946.12(3) ARE NOT REASONABLE, CONTENT-NEUTRAL RESTRICTIONS.

A. *Tronca* disposes of petitioners' overbreadth challenge.

Petitioners contend that § 946.12(3) infringes on protected speech and is therefore overbroad. This argument is precluded by this court's decision in *Tronca*. As in the instant case, the defendants in *Tronca* asserted that the official misconduct statute regulated speech protected by the First Amendment. 84 Wis.2d at 88. This court rejected that argument, concluding that the official misconduct statute is not unconstitutionally overbroad. *Id.* at 88-90.

B. The misconduct statute does not regulate speech and is therefore not subject to a First Amendment overbreadth challenge.

Even if petitioners' overbreadth argument were not decided against them in *Tronca*, it is precluded by this court's decision in *State v. Robins*, 2002 WI 65, 253 Wis.2d 298, 646 N.W.2d 287. In *Robins*, defendant made an as-applied challenge to the child enticement statute, arguing that application of the statute to his conduct violated his First Amendment rights. *Id.* at ¶ 39. The court refused to delve into the intricacies of the First Amendment claim, holding that the child enticement statute did not regulate speech, either on its face or as applied, but instead, regulated conduct. *Id.* at ¶¶ 40-44. As a result, the statute was not "susceptible of First Amendment scrutiny." *Id.* at ¶ 43. The court noted: "That some of the proof in this case consists of internet 'speech' does not mean that this prosecution, or another like it, implicates First Amendment rights." *Id.* at ¶ 44.

Similarly, the official misconduct statute regulates conduct, not speech. It prohibits a public official from exercising his or her discretionary power in a manner inconsistent with the duties of the official's office or employment or with the rights of others, with the intent to obtain a dishonest advantage for the official or others. Wis. Stat. § 946.12(3). That the state may have to prove its case in part through use of statements petitioners made does not make the misconduct statute one regulating speech any more than the child enticement statute addressed in *Robins*. As in *Robins*, therefore, § 946.12(3) is not "susceptible of First Amendment scrutiny," 253 Wis.2d 298, ¶ 43, and petitioners' First Amendment overbreadth challenge fails.

C. Petitioners' claim of overbreadth is meritless because the charged violations of § 946.12(3) are reasonable, content-neutral restrictions.

The genesis of the overbreadth doctrine has been attributed to the United States Supreme Court in *Thornhill v. Alabama*, 310 U.S. 88 (1940), which recognized that broadly written statutes substantially inhibiting free expression should be open to attack even by a party whose own conduct is unprotected under the First Amendment. *State v. Stevenson*, 2000 WI 71, ¶ 11, 236 Wis.2d 86, 613 N.W.2d 90.

Nevertheless, courts should utilize the overbreadth doctrine only sparingly as a tool for statutory invalidation, proceeding with caution and restraint. *Id.* at ¶ 14. "Marginal infringement or fanciful hypotheticals of inhibition that are unlikely to occur will not render a statute constitutionally invalid on overbreadth grounds." *Id.* Invalidation of statutes on grounds of overbreadth is "'strong medicine'" employed "only as a last resort." *Id.* at ¶ 44 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). Therefore, a statute will not be invalidated on overbreadth grounds "because in some conceivable, but limited, circumstances the regulation might be improperly applied." *Milwaukee v. K.F.*, 145 Wis.2d 24, 40, 426 N.W.2d 329 (1988). Although some laws "may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face." *Broadrick*, 413 U.S. at 615.

If a court determines that a statute is overbroad, it has three options: First, apply a limiting construction to rehabilitate the statute; second, sever the unconstitutional provisions of a statute, leaving the remainder of the legislation intact, or; third, determine that the statute is not amenable to judicial limitation or severance and invalidate

it "upon a determination that it is unconstitutional on its face." *Stevenson*, 236 Wis.2d 86, ¶ 15.[6]

When one challenges the constitutionality of a statute, the burden of proof falls upon that party to prove that the statute is unconstitutional beyond a reasonable doubt. *Winnebago County Dep't of Soc. Servs. v. Darrell A.*, 194 Wis.2d 627, 637, 534 N.W.2d 907 (Ct. App. 1995). When the statute implicates the exercise of First Amendment rights, however, the burden shifts to the government to prove beyond a reasonable doubt that the statute passes constitutional muster. *Lounge Management v. Town of Trenton*, 219 Wis.2d 13, 20, 580 N.W.2d 156 (1988).

As stated, the official misconduct statute does not regulate speech. Even if this court declines to rule that the statute may not be challenged on First Amendment grounds, it must, at a minimum, hold petitioners to their burden of proving the statute unconstitutional beyond a reasonable doubt. Petitioners have failed to meet their burden.

The constitutional right to freedom from state interference with one's right to expression is not absolute. *State v. Bagley*, 164 Wis.2d 255, 265, 474 N.W.2d 761 (Ct. App. 1991). The government is not required "freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 799-800 (1985).

Like any property owner, the state may reserve its property for its lawfully dedicated use. *Adderley v. Florida*, 385 U.S. 39, 47 (1966). Even a complete ban on

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[6]If this court finds any constitutional defect, the state respectfully seeks leave to address potential limiting constructions in a supplemental brief.

free expression may be imposed in a non-public forum if the prohibition is reasonable and content-neutral. *United States Postal Serv. v. Council of Greenburgh Civic Assoc.*, 453 U.S. 114, 132 (1981).

A government office is used to carry out the government's business, and is therefore a nonpublic forum, so that any restriction need only be reasonable and content-neutral. *See Cornelius*, 473 U.S. at 805-806; *United Auto Workers, Local Union 1112 v. Philomena*, 700 N.E.2d 936, 949 (Ohio Ct. App. 1998).

The state is entitled to address a broad problem on a broad scale. Governments may place "'evenhanded restrictions on the partisan political conduct' of their employees, inasmuch as 'such restrictions serve valid and important state interests.'" *Mining v. Wheeler*, 378 F. Supp. 1115, 1121 (W.D. Mo. 1974) (upholding constitutionality of municipal "Little Hatch Act")(quoting *Broadrick*, 413 U.S. at 606); *see also United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (upholding the Hatch Act's provision prohibiting executive branch employees from actively participating in political campaigns).

The statutory scheme prohibiting incumbency abuse in Wisconsin addresses the particular problem of the operation of political campaigns using public resources. It establishes a simple, understandable rule: A legislator may not have his or her staff work directly on campaigns during state time or using state resources. This puts well-defined resources out of bounds for well-defined activity. No group, cause, or message is singled out for restriction. All state officials and employees are prohibited equally from engaging in this activity.

Petitioners pose several hypotheticals, none of which resembles the charged case and each apparently representing petitioners' best efforts to demonstrate ambiguity and overbreadth (petitioners' brief at 40-41). In fact, they only demonstrate the clarity of the law. In the first hypothetical, a legislator seeks a copy of a campaign

finance report with the purpose of using it to advocate for proposed campaign finance legislation, and is glad that it may also shame a political opponent (*id.* at 40). This is clearly not prohibited activity, because the legislator has a legislative, non-campaign purpose. In sharp contrast, when Jensen had state employees use their publicly-funded positions to operate Taxpayers for Jensen, or when Foti had Schultz spend her time producing campaign finance reports for campaign committees, as alleged, *inter alia*, in the complaint, those activities are prohibited. Petitioners' hypothetical only demonstrates that a line can be drawn to prohibit and prosecute the conduct charged in this case.

In the second hypothetical, petitioners suggest that returning a phone call to a constituent could be construed as improper political activity. Constituent contact related to legislative business does not run afoul of the law at issue here, even if the legislator and his staff hope that responding to constituents will encourage campaign contributions *when and if solicited from outside the Capitol*, which will then be *collected and accounted for in campaign finance reports assembled outside the Capitol.* In contrast, during work hours or on state phones, legislative aides may not solicit contributions or organize campaign fundraising events. It is not "campaigning" to "return the phone call of a constituent who has a question on the legislator's position on an issue." (Petitioners' brief at 41). Petitioners' professed confusion is disingenuous.

For years, agencies such as the Wisconsin Legislative Council Staff have had no problem summarizing the rule in bulletins and memos. *See, e.g.*, Wisconsin Legislative Council Staff, *"Ethics Code Requirements," Information Bulletin 99-5,* at 8-9 (January 1999). Legislators are to ask themselves,

> Am I using the state's time, resources or facilities in my campaign for elective office?"
>
> ....

> **Question**: May a legislator's staff work on the legislator's campaign?
>
> **Answer**: The Ethics Code prohibits a legislator's staff from working on the legislator's campaign during state time or with the use of state facilities.

Official misconduct of the type charged in this case is directly related to the effective and credible operation of state government in Wisconsin and narrowly tailored to achieve its purpose. Its purpose requires that it apply to many buildings and bind all state officials and employees. It is a reasonable, content-neutral restriction that chills only conduct sought to be restricted, that is, abuses of public resources uniquely available to incumbents for the dishonest advantage of incumbents. Therefore, petitioners' motion to dismiss based on overbreadth was properly denied.

IV. PETITIONERS HAVE FAILED TO SHOW BEYOND A REASONABLE DOUBT THAT THE OFFICIAL MISCONDUCT CHARGES IN THIS CASE VIOLATE THE SEPARATION OF POWERS DOCTRINE.

Petitioners claim that application of § 946.12(3) to their conduct violates the separation of powers doctrine. It is petitioners' burden to establish such a constitutional violation beyond a reasonable doubt. *State v. Holmes*, 106 Wis.2d 31, 38, 315 N.W.2d 703 (1982). For the reasons set forth below, petitioners have not met their burden and their separation of powers claim must fail.

A. The courts may adjudicate the criminal charges against petitioners in this case, even if Assembly rules must be applied to define their duties as legislators or legislative aide.

In support of their argument, petitioners first assert that "the legislature has exclusive authority to establish the duties of its members." (Petitioners' brief at 42) (initial caps omitted). As a preliminary matter, even if this were true, the state notes that the legislature has established the duty to refrain from running private political campaigns through taxpayer dollars, through the enactment of § 946.12(3) and provisions in chapters 11, 12 and 19, and by creation of the Assembly documents and e-mails discussed above.

More fundamentally, however, petitioners' argument amounts to nothing more than an assertion that as members of the legislature and as a legislative aide, they are beyond the reach of the criminal law. While petitioners purport to acknowledge that they are subject to criminal laws like everyone else (petitioners' brief at 45), in essence they are asserting that prosecution for any crime committed in their official capacity must necessarily violate the separation of powers doctrine. Such a position is untenable.

Petitioners cite art. IV, § 8 of the Wisconsin Constitution, which provides that the Wisconsin State Senate and Assembly "'may determine the rules of its own proceedings, punish for contempt and disorderly behavior, and with the concurrence of two-thirds of all the members elected, expel a member; but no member shall be expelled a second time for the same cause.'" (Petitioners' brief at 42-43). They further cite *State ex rel. LaFollette v. Stitt*, 114 Wis.2d 358, 367, 338 N.W.2d 684 (1983), in which the court stated that "'recourse against legislative errors, nonfeasance or questionable procedure is by political action only'" (*id.* at 41).

Prosecuting petitioners for criminal offenses under § 946.12(3) does not violate art. IV, § 8 or this court's holding in *Stitt*. Neither the executive nor the judicial branch is interfering with the Assembly's ability to "determine the rules of its own proceedings" or is impeding the due functioning of the legislature. Nor does the state attempt to prosecute for contempt or disorderly behavior or seek to expel anyone from the legislature. The state is merely looking at an existing legislative rule as one source for determining what duties petitioners had and whether they acted inconsistently with those duties, for purposes of enforcing a criminal statute. That statute was obviously designed to hold public officials accountable for the misuse of their position. The executive branch has the obligation to enforce such statutes. Wis. Const. art. V, § 4.

This court rejected a similar separation of powers argument in *In re John Doe Proceeding*, 2004 WI 65, 272 Wis. 2d 208, 680 N.W.2d 792. In that case petitioners challenged a John Doe subpoena issued to the Legislative Technology Services Bureau on the grounds that the subpoena intruded into the legislature's "core zone" of authority and that § 13.96 was a "rule of proceeding" under art. IV, § 8, that only the legislature could interpret. *Id.* at 272 Wis.2d 208, ¶ 24. In rejecting these arguments, this court noted that the subpoena was not attempting to change the way in which the legislature functions but rather was attempting to gather information in a criminal investigation. *Id.* at 272 Wis.2d 208, ¶ 26. The court further noted that if all of the documents maintained by the LTSB were out of bounds to a criminal investigation, "the legislature would have effectively immunized its members and employees from criminal prosecution and in so doing usurped the role of the executive branch in assuring the faithful execution of all the laws and the prosecution of crime." *Id.*

While recognizing that courts generally are unwilling to decide whether the legislature adhered to its

own rules governing how it operates, this court found that § 13.96, which makes the electronic records of the legislature confidential, was not a rule of proceeding for purposes of art. IV, § 8, because it had "nothing to do with the process the legislature uses to propose or pass legislation or how it determines the qualifications of its members." *Id.* 272 Wis.2d 208, ¶ 30. So too is the rule at issue here not a "rule of proceeding." A rule that reiterates statutory prohibitions on the use of state resources for private campaigns has nothing to do with the process the legislature uses to propose or pass legislation or how it determines the qualifications of its members. Instead it prohibits the use of state resources for activities that are *not* related to those functions.

In *In re John Doe Proceeding,* this court found compelling the fact that the subpoena sought information in the course of a criminal investigation, a function assigned to the executive branch. *Id.* 272 Wis.2d 208, ¶¶ 26, 31. In the present case, the executive branch is carrying out its function of prosecuting criminal activity.

Petitioners suggest that any inquiry into what duties legislators ask their employees to perform is "constitutionally off limits" because "the legislative process intertwines legislative, political and campaign considerations." (Petitioners' brief at 44). By the same logic, if Jensen and Foti had asked Schultz to blackmail a political opponent or accept a bribe from a constituent, this too would be "constitutionally off limits." Moreover, this case does not involve the issue of legislative acts that have a campaign component; it involves pure campaigning, devoid of legitimate legislative activity, which is why it was charged.

Petitioners' suggestion that only the legislature may define, interpret and enforce rules against its members would invalidate not only § 946.12(3) but also all of the provisions regulating legislators' activities contained in chapters 11, 12 and 19, discussed above. Petitioners have failed to support their radical position.

B. The official misconduct charges in this case are justiciable because each charge rests on unambiguous legal standards and does not interfere with any unique function of the legislature.

Petitioners next assert that what constitutes the duties of legislators and aides is a nonjusticiable "political question."

In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the United States Supreme Court identified six alternative factors to be considered in determining whether an issue is a "political question" and therefore nonjusticiable. At least one of the factors must be "prominent on the surface" if an issue is to be determined nonjusticiable. *Id.* Further, such a determination must be made or based upon the particular facts and posture of an individual case. *Id. See also United States v. Rostenkowski,* 59 F.3d 1291, 1310 (D.C. Cir. 1995). Therefore, any hypothetical situations raised by petitioners should be disregarded as they are not relevant to the question of justiciability in this case.

Petitioners address only the first two factors set forth in *Baker v. Carr*: a textually demonstrable constitutional commitment to a coordinate political department and a lack of judicially discoverable and manage standards for resolving the issue. In ignoring the other factors, petitioners implicitly concedes that those factors are not relevant here. The first and second present no obstacle either.

In arguing for the applicability of the first factor, constitutional commitment of the issue to another branch, petitioners merely reassert their arguments related to art. IV, § 8, discussed above. As stated, this constitutional provision addresses legislative procedural rules, punishment for "contempt" and "disorderly" behavior, and

expelling members. It is inapplicable to the criminal charges at issue here.

With respect to the second *Baker* factor, petitioners argue there are no judicially manageable standards to prosecute them under § 946.12(3) because there are no judicially discoverable and manageable standards for distinguishing between "official" and "political" work (petitioners' brief at 37).

The lack of judicially discoverable and manageable standards for resolving the issue, was addressed in *Rostenkowski*, 59 F.3d 1291. This case cuts against petitioners' position.

Rostenkowski involved prosecution of Illinois Congressman Daniel Rostenkowski for misappropriation of public funds. Rostenkowski argued that the prosecution was based on the prosecutor's interpretation of the Rules of the House of Representatives, in violation of the Rulemaking Clause and the separation of powers doctrine. *Id.* at 1306. The Rulemaking Clause, like art. IV, § 8 of the Wisconsin Constitution, empowers congress to "determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds of all the members elected, expel a member." U.S. Const. art. I, § 5.

While the *Rostenkowski* court held that, when internal legislative rules are overly ambiguous, the courts may not invade the legislature's constitutional rulemaking authority by judicial improvisation; it clearly articulated the converse of that principle:

> If a particular House Rule is sufficiently clear that we can be confident of our interpretation, however, then that risk is acceptably low and preferable to the alternative risk that an ordinary crime will escape the reach of the law merely because the malefactor holds legislative office.

Id. at 1306 (citation omitted). Thus, a court may interpret an internal legislative rule if there is a reasonably "discernible legal standard." *Id.* (citing *United States ex rel. Joseph v. Cannon,* 642 F.2d 1373 (D.C. Cir. 1981)).

The *Rostenkowski* court further observed that internal legislative rules are not to be viewed in the abstract. Consistent with *Baker v. Carr*, the *Rostenkowski* court recognized that justiciability depends upon whether a rule is clear when applied to the specific facts of a particular case. *Id.* at 1310 (emphasis added).

The standards for resolving the criminal charges in this case are discernible and unambiguous. As already discussed above, the use of state resources and employees for campaign activities is expressly prohibited by the statutes, and the Assembly Handbook, e-mails and memos. Notwithstanding these explicit prohibitions, petitioners assert that there are "no statutes, rules or regulations that define or differentiate political or campaign-related activity." Petitioners ignore the obvious sources cited above.

In their brief, petitioners state "The obvious question that immediately arises is how can a legislator be prevented from engaging in political activity while functioning in a legislative capacity?" (Petitioners' brief at 32-33). This question ignores the repeated warnings provided by the Assembly itself to its members and employees that political activity using state resources is strictly prohibited.

There is nothing ambiguous about the term "political activity." That phrase is used interchangeably with "political purposes" and "campaign activity" in the Assembly documents. "Political purposes" is a term of art

that has been long equated with campaign activity by the legislature and the courts.

For example, the phrase "political purposes" is used extensively in chapter 11. Significantly, that chapter is entitled "Campaign Financing." The campaign finance restrictions therein apply primarily to acts done "for political purposes," which are specifically defined as acts done "for the purpose of influencing the election or nomination for election of any individual to state or local office." Wis. Stat. § 11.01(16).[7] The other express provisions from chapters 11, 12 and 19 discussed above further provide "judicially discoverable and manageable standards."

Lest there be any doubt about the type of political activity the Assembly memos make it clear: state equipment, supplies, and employees are strictly for conducting official state business and are not to be used at all for *campaign* activities (32:Ex.9 at 2; R-Ap.).

The term "political activity" is readily discernible when applied to the facts of the criminal complaint. Petitioners would be hard-pressed to deny that running private election campaigns, and hiring and supervising someone to do that, constitutes political activity. Supervising state employees to work for Taxpayers for Jensen is, by any definition of the term, "political activity." Fundraising for partisan election campaigns, which Schultz did under the supervision of Jensen and Foti, and recruiting and directly assisting political

[7]Predecessor statutes to chapter 11 also defined for the phrase "for political purposes" in a similar manner. *See, e.g., State ex rel. LaFollette v. Kohler,* 200 Wis. 518, 228 N.W. 895 (1930) (interpreting then existing § 12.01).

candidates, which Carey and Kratochwill did under Jensen's supervision, are unambiguous political activities.

Here, the Assembly's rules and the statutes enacted by the legislature are sufficiently clear "that [this court] can be confident of [its] interpretation" of them. *Rostenkowski*, 59 F.3d at 1306. Under this authority, the operation of private political campaigns using state funds and resources was strictly prohibited. In the present case, a judicially discoverable and manageable standard exists. As set forth above, the Assembly's own rules expressly forbid legislative employees from "political activity" using state time or resources.

For these same reasons, *People v. Ohrenstein*, 549 N.Y.S.2d 962 (App. Div. 1989), relied upon by petitioners, is also distinguishable. In that case, the court determined that "there were no legislative standards, rules or guidelines in existence detailing the 'proper duties' of legislative employees." *Id.* at 975.

Cannon, 642 F.2d 1373, and *Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir. 1980), both cited by petitioners, may be distinguished on similar grounds. The *Cannon* court held there was "a complete absence" of judicially discoverable and manageable standards for resolving the question whether Senators may use paid staff members in their campaign activities. *Id.* at 1379. The court stated: "Not even the Senate itself has been able to reach a consensus on the propriety of using staff members in reelection campaigns." *Id.* at 1380. Furthermore, no other statute, administrative law or judicial decision guided the court in determination of the issue generated by the charges. *Id.* at 1379.

Likewise, as recognized in the *Rostenkowski* court, in *Winpisinger,* the court had no standard at all by which to decide whether the defendants' conduct was "official." *Rostenkowski,* 59 F.3d at 1309.

In contrast, the Wisconsin Legislature has clearly established that state employees and state resources cannot be used to conduct campaign activities. Given this clear policy statement by the legislature, petitioners' claim that there are no statutes, rules or regulations that define or differentiate political or campaign-related activity is unsupportable.

In view of the foregoing, petitioners have failed to demonstrate a textually demonstrable constitutional commitment of this issue to the legislature or a lack of judicially discoverable and manageable standard for resolving the issue. *Carr*, 369 U.S. at 217. Consequently, this case is justiciable and petitioners' separation of powers claim fails.

CONCLUSION

> Left unsaid thus far are certain propositions so deeply embedded in our jurisprudence that they rarely find expression. Perhaps those values which go to the very heart of our democratic system of government need restating. The first is that no man is beyond the reach of the law. And the second is that those privileged to make the laws are obliged to obey them and live within their prescriptions.

State v. Gregorio, 451 A.2d 980, 988 (N.J. Super. 1982). Petitioners were properly charged under well-established law, and their prosecutions should go forward. Therefore, the state respectfully requests that this court affirm the

court of appeals' decision and the circuit court's order denying petitioners' motions to dismiss.

Dated this 16th day of September, 2004.

Respectfully submitted,

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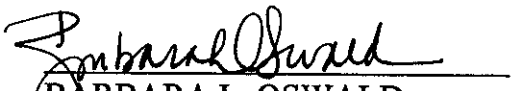
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 14,858 words.



BARBARA L. OSWALD
Assistant Attorney General

STATE OF WISCONSIN
IN SUPREME COURT

No. 03-0106-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SCOTT R. JENSEN,
STEVEN M. FOTI and
SHERRY L. SCHULTZ,

Defendants-Appellants-Petitioners.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT IV, AFFIRMING A PRETRIAL ORDER DENYING PETITIONERS' MOTION TO DISMISS THE CRIMINAL COMPLAINT, ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE DANIEL R. MOESER, PRESIDING

AMENDED APPENDIX OF PLAINTIFF-RESPONDENT

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INDEX TO APPENDIX

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

CRIMINAL COMPLAINT

STATE OF WISCONSIN, PLAINTIFF

VS.

✓**SCOTT R. JENSEN,**
DOB 08/24/1960
Sex/Race: Male/White

850 South Springdale Road
Waukesha, Wisconsin 53186

OFFENSE(S): Misconduct In Public Office as a Party to the Crime (Counts One, Three, Four)
Intentional Misuse of Public Position For Private Gain as a Party to the Crime (Count Five)

STATUTE(S) VIOLATED: 939.05; 946.12(3); 19.45(2); 19.58(1)

DA Case No. _____ **Court Case No. 02 CF** 2453

DANE COUNTY, WI
CIRCUIT COURT
2002 OCT 18 AM 9:56

****

STEVEN M. FOTI,
DOB 12/03/1958
Sex/Race: Male/White

1117 Dickens Drive
Oconomowoc, Wisconsin 53066

OFFENSE(S): Misconduct In Public Office as a Party to the Crime (Count One)

STATUTE(S) VIOLATED: 939.05; 946.12(3); 939.05; 19.45(2); 19.58(1)

DA Case No. _____ **Court Case No. 02 CF** _____

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SHERRY L. SCHULTZ,
DOB 3/25/1952
Sex/Race: Female/White

1418 Pleasure Drive
Madison, WI 53704

OFFENSE(S): Misconduct In Public Office as a Party to the Crime (Count Two)

STATUTE(S) VIOLATED: 939.05; 946.12(3); 939.05

DA Case No. _____ **Court Case No. 02 CF** _____

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BONNIE L. LADWIG
DOB 12/11/1939
Sex/Race: Female/White

6347 Norfolk Lane
Racine, Wisconsin 53406

OFFENSE(S): Intentional Misuse of Public Position For Private Gain as a Party to the Crime (Count Five)

STATUTE(S) VIOLATED: 939.05; 19.45(2); 19.58(1)

DA Case No. _____ **Court Case No. 02 CM _____**

DEFENDANTS

COMPLAINING WITNESS
DCI Director David Collins

COUNT ONE (JENSEN, FOTI: MISCONDUCT IN OFFICE)

THE ABOVE NAMED COMPLAINING WITNESS, BEING DULY SWORN, SAYS THAT DEFENDANTS SCOTT JENSEN AND STEVEN FOTI, AS PARTIES TO THE CRIME, IN THE COUNTY OF DANE, STATE OF WISCONSIN, between on or about January 27, 1998, and on or about October 8, 2001, at the City of Madison, in their capacities as public officers, did by acts of omission and commission, exercise their discretionary powers in manners inconsistent with the duties of their offices, with the intent to obtain a dishonest advantage for others, by hiring, retaining, and supervising a State employee, namely Sherry Schultz, to solicit, account for, distribute and publicly report money for political campaigns, and assist others in these same tasks, during times when Schultz was compensated as a State employee or using State resources or both; contrary to Sections 939.05 and 946.12(3) of the Wisconsin Statutes, a Class E felony; and upon conviction may be fined not more than $10,000 and imprisoned not more than five (5) years or both.

COUNT TWO (SCHULTZ: MISCONDUCT IN OFFICE)

AS A SECOND AND SEPARATE OFFENSE: THAT DEFENDANT SHERRY SCHULTZ, AS PARTY TO THE CRIME, IN THE COUNTY OF DANE, STATE OF WISCONSIN, between on or about January 27, 1998, and on or about October 8, 2001, at the City of Madison, in her capacity as a public employee, did by acts of omission and commission, exercise her discretionary powers in manners inconsistent with the duties of her employment, with the intent to obtain a dishonest advantage for others, by soliciting, accounting for, distributing, and publicly reporting money for political campaigns, and assist others in these same tasks, during times when Schultz was compensated as a State employee or using State resources or both; contrary to Sections 939.05 and 946.12(3) of the Wisconsin Statutes, a Class E

felony; and upon conviction may be fined not more than $10,000 and imprisoned not more than five (5) years or both.

COUNT THREE (JENSEN: MISCONDUCT IN OFFICE)

AS A THIRD AND SEPARATE OFFENSE: THAT DEFENDANT SCOTT JENSEN, AS A PARTY TO THE CRIME, IN THE COUNTY OF DANE, STATE OF WISCONSIN, beginning no later than in or about November 1997, and continuing to in or about May, 2001, at the City of Madison in his capacity as a public officer, did by acts of omission and commission, exercise a discretionary power in a manner inconsistent with the duties of his office, with the intent to obtain a dishonest advantage for others by intentionally hiring, or retaining and supervising, Ray Carey and Jason Kratochwill, State employees, to recruit and otherwise directly assist candidates for political office as candidates, and cause others to do the same, during times when Carey and Kratochwill were compensated as State employees or using State resources or both; contrary to Sections 939.05 and 946.12(3) of the Wisconsin Statutes, a Class E felony; and upon conviction may be fined not more than $10,000 and imprisoned not more than five (5) years or both.

COUNT FOUR (JENSEN: MISCONDUCT IN OFFICE)

AS A FOURTH AND SEPARATE OFFENSE: THAT DEFENDANT SCOTT JENSEN, AS A PARTY TO THE CRIME, IN THE COUNTY OF DANE, STATE OF WISCONSIN, between in or about 1997 and in or about November 2000, at the City of Madison, in his capacity as a public officer, did by acts of omission and commission, exercise a discretionary power in a manner inconsistent with the duties of his office, with the intent to obtain a dishonest advantage for Taxpayers for Jensen, by intentionally retaining and supervising State employees to work on Taxpayers for Jensen during times when the employees were compensated as State employees or using State resources or both; contrary to Sections 939.05 and 946.12(3) of the Wisconsin Statutes, a Class E felony; and upon conviction may be fined not more than $10,000 and imprisoned not more than five (5) years or both.

COUNT FIVE (JENSEN, LADWIG: INTENTIONAL MISUSE OF PUBLIC POSITIONS FOR PRIVATE BENEFIT)

AS A FIFTH AND SEPARATE OFFENSE: THAT DEFENDANTS SCOTT JENSEN AND BONNIE LADWIG, AS PARTIES TO THE CRIME, IN THE COUNTY OF DANE, STATE OF WISCONSIN, between January 1997 and continuing to in or about May 2001, at the City of Madison, intentionally used their public positions at times when they were State public officials to obtain financial gain for the private benefit of an organization with which they were each associated, namely the Republican Assembly Campaign Committee; contrary to Sections 939.05, 19.45(2) and 19.58(1) of the Wisconsin Statutes, an unclassified misdemeanor; and upon conviction may be fined not less than $100 nor more than $5,000 or imprisoned not more than one year in the county jail or both.

FACTS

Complainant ***David Collins****, Director of the White Collar Crimes Bureau for the Wisconsin Department of Justice's Division of Criminal Investigation (DCI), swears and affirms as follows:*

Background Facts

Legislators, Their Offices, And Taxpayers For Jensen

Complainant is aware from *The Blue Book*, an official directory of Wisconsin government published by the State, that the Office of Wisconsin State Representative Scott R. Jensen ("Jensen Capitol office") was between January 1992 and the present a Wisconsin State legislative office operated and supervised by Scott R. Jensen ("Jensen"), an elected member of the Wisconsin State Assembly ("State Assembly" or "Assembly"). Jensen became Speaker of the State Assembly on or about November 4, 1997. Throughout the period of his terms in the Assembly, Jensen has been elected to two-year terms of office and received an annual salary from the State.

The official biography of Jensen carried on his legislative website at this time states that Jensen holds a Masters Degree In Public Policy from Harvard University. A Jensen campaign website states that Jensen was Director of Government Relations for Wisconsin Manufacturers and Commerce, 1984 - 1987.

Campaign finance reports filed with the State Elections Board reflect that since at least 1997, Jensen has used his campaign committee, Taxpayers for Jensen, to raise money for his campaigns for political office.

The Blue Book states that the Office of State Representative Steven M. Foti ("Foti Capitol office") was, throughout the period 1982 to present, a Wisconsin State legislative office operated and supervised by Steven M. Foti ("Foti"), an elected member of the State Assembly. Foti was elected to two-year terms of office and received an annual salary from the State, and has been Majority Leader of the Assembly for the period 1997 to the present.

The Blue Book states that the Office of State Representative Bonnie L. Ladwig ("Ladwig Capitol office") was, throughout the period 1992 to present, a Wisconsin State legislative office operated and supervised by Bonnie L. Ladwig ("Ladwig"), an elected member of the State Assembly. Ladwig was elected to two-year terms of office and received an annual salary from the State and has been Assistant Majority Leader of the Assembly for the period 1997 to the present.

Assembly Republican Caucus – ARC

During all times material to this complaint, state legislators elected from each of the two major political parties of each of the two houses of the Legislature had authority to employ "research staff assigned to . . . party caucuses . . . [as] necessary to enable [the legislature] to perform its functions and duties and to best serve the people of this state," pursuant to Sec. 13.20, Wis. Stats. One of those four partisan caucuses authorized under this statute was called the Assembly Republican Caucus ("ARC").

DCI Special Agent Amy Blackwood ("S/A Blackwood") reports that she participated in an interview with Charles Sanders, whose statements included the following. Sanders was the Chief Clerk of the Wisconsin State Assembly from 1971 until January 4, 2001. The partisan caucuses were created to assist legislators with speech writing, letter writing, bill drafting, and other services to support legislators because legislators did not, at the time the partisan caucuses were created, have their own staff. Sanders also stated that partisan caucus employees are state employees and should not perform campaign work on state time or with state resources. The director of the ARC reported directly to the Assembly Speaker.

Your complainant has reviewed a copy of a report issued by John Scocos in his capacity as Assembly Chief Clerk, dated September 4, 2001, in which Scocos stated in part that the mission of the partisan caucuses was to assist legislators in administration, political and legislative research, policy analysis, monitoring committee activities and communicating with constituents.

From on or about January 15, 1987 to June 30, 1989, Jensen was the director of the ARC, according to Assistant Assembly Chief Clerk Patrick Fuller.

Prohibitions Against Campaign Activity Using State Resources

In his September 4, 2001 report, Scocos stated that all state employees, hence all legislative staff, including caucus staff, were prohibited by Assembly rule and state statutes (Wis. Stats. § 11.36 and § 11.37) from using state property and facilities for political campaign activity and from engaging in political campaign work while on state time and during working hours.

Complainant has reviewed a hard copy of an e-mail dated February 27, 1997, from then Wisconsin State Representative Ben Brancel, speaker of the Assembly, to "All Assembly; All Senate" which stated as follows:

> An email message of a political nature was inadvertently sent by a new Assembly employee today.
>
> This serves as a reminder to all Legislative staff that political activity, whether partisan or non-partisan is not permitted during working hours. Furthermore, all state owned facilities, office equipment,

including the electronic mail system, and all other state owned supplies and materials are **strictly prohibited** from use for a political purpose anytime. This means both use during and after business hours.

Citizenship rights to political activity and community involvement must be exercised on non-office time and equipment.

Thank you for your attention to this matter.

[Bolded here as it appears in original e-mail text]

DCI Special Agent Deb Strauss ("S/A Strauss") reports that she participated in an interview of Brian Dake, who advised that he was a legislative employee from 1995 through 2001. In every election year, Assembly Chief Clerk Sanders sent an e-mail to the entire Assembly and Assembly staff regarding the prohibition on campaign work.

The Wisconsin Ethics Board issued an advisory opinion in 1978 (Ethics Board 138, July 27, 1978) that states in part: "A legislative employee should not engage in campaign activities (a) with the use of the state's facilities, supplies, or services not generally available to all citizens; (b) during working hours for which he or she is compensated for services to the State of Wisconsin, or at his or her office in the Capitol regardless whether the activity takes place during regular working hours."

The Republican Assembly Campaign Committee - RACC

Wisconsin Stat. § 11.265 authorizes the creation and operation of Legislative Campaign Committees ("LCC") for each party in the two legislative houses. LCC solicit and distribute political contributions for candidates of a political party for legislative office. LCC's are governed by Chapter 11 of the Wisconsin Statutes. During all times material to this complaint, the Republican Assembly Campaign Committee ("RACC") purported to operate as an LCC.

S/A Strauss reports that Judith Rhodes Engels said in part that Engels was employed by the Ladwig Capitol office, in part, to perform RACC related duties from the fall of 1998 to March/April 2001, and that the goal of RACC was to raise money for the campaigns of candidates for the Assembly on the Republican side.

S/A Blackwood and S/A Strauss report that the two persons who served as directors of the ARC between December 1994 and December 2001, Ray Carey and Jason Kratochwill, both said in interviews that when they were hired for the position, they were informed that they would also act as executive director of RACC and perform RACC duties and were provided no office other than the ARC to perform these duties. Kratochwill also provided S/A Strauss with a chart setting forth the RACC structure dated August 1999, which lists Jensen as the chair of RACC, Ladwig

as the finance chair and treasurer and Kratochwill as executive director and that also lists the ARC and its staff as part of RACC.

Venue

At all times material to this complaint, the Capitol offices of Jensen, Foti, and Ladwig, the offices of the former ARC, and the offices of the Republican Party of Wisconsin ("RPW") were in the City of Madison, Dane County, Wisconsin, and RACC maintained no office.

FACTS AS TO COUNT ONE (JENSEN, FOTI): OFFICIAL MISCONDUCT IN OFFICE RELATED TO FUNDRAISING ACTIVITIES OF SHERRY SCHULTZ ON STATE TIME, USING STATE RESOURCES

Complainant swears, reaffirms, and incorporates here by reference in connection with Count One all facts related in this complaint in connection with the Background Facts, and Counts Three, Four, and Five, of this complaint. In addition, complainant further swears and affirms as follows.

Statements of John Scocos

DCI Special Agent Dorinda Freymiller ("S/A Freymiller") reports that John Scocos, who identified himself as the Chief Clerk for the Wisconsin State Assembly, stated that based on State records maintained in the normal and ordinary course of business that Sherry Schultz was hired by Representative Steven Foti on January 27, 1998, and was assigned to work at the ARC. These records also reflect that Schultz was a full-time Wisconsin State employee from that date until October 8, 2001, with a final yearly salary of $65,052.

Statements of Linda Hanson

S/A Blackwood reports that she participated in an interview with Linda Hanson during which Hanson made statements including the following. Hanson was an employee of the Foti Capitol office from January 1992 to August 1998. When Foti became the Assembly Majority Leader, his Capitol office gained a legislative staff position. Foti previously had four legislative staffers and wanted to fill the fifth position with an employee who would handle campaign fundraising, as well as candidate recruitment and traveling to districts. Hanson had various conversations with Foti in which they talked about hiring someone to this State position to do campaign work. Foti told Hanson that Foti wanted to hire Sherry L. Schultz, but Foti explained that the ultimate decision of who to hire would be Jensen's. Foti and Jensen both knew that Schultz was skilled in campaign work. Hanson was very uncomfortable that Schultz was being hired as a State employee for strictly campaign-related duties, and expressed her discomfort to Foti on more than one occasion. Hanson told Foti that there was no way that Schultz was going to do that kind of work out of the Foti Capitol office.

After Schultz began working on the Foti Capitol office payroll, though physically located at the ARC, Schultz would brag about how much money she raised. Foti and the rest of his staff knew what Schultz was doing with her time. The only time Schultz came into the Foti Capitol office was to see Foti. Schultz "was not hired to do legitimate State work," and did not do any non-campaign-related work.

Statements of Carrie Hoeper Richard

S/A Freymiller reports that she participated in an interview of Carrie Hoeper Richard ("Richard"), who related that she was an employee of the Jensen Capitol office from August 1997 to October of 1999. Richard's statements included the following. When Sherry Schultz was hired by the Foti office, Jensen told his Capitol office staff, including Richard and Jensen Chief of Staff Brett Healy, that Schultz would manage fundraising for candidates and vulnerable incumbents. Jensen announced that Schultz would be located at the ARC.

Richard further said that Schultz visited Jensen's Capitol office to meet with Jensen approximately twice a week during campaign season in 1998, and approximately twice each month the rest of the time. When Jensen met with Schultz, Richard usually joined them. Other persons attending at times were Healy and Foti. Ladwig and a legislative staffer of Ladwig's, Judy Rhodes Engels, came to one or two of these meetings. The purpose of these meetings was for Schultz to report on fundraising progress. Schultz would describe her progress in helping various candidates, and Jensen would give Schultz a list of candidates he wanted her to assist. Jensen tried to steer Schultz's attention toward helping vulnerable candidates.

When Schultz first began working for Foti, Schultz met individually with most of the Assembly Republican members, focusing on the vulnerable candidates, in order to develop fundraising plans for them. Schultz also coordinated fundraising events and assisted candidates with campaign finance reports, especially for non-incumbent candidates during the 1998 election and during special elections. Campaign treasurers called Schultz when they had questions about filling out the reports. Schultz told Richard that Schultz was helping some candidates with "big fixes" regarding campaign finance reports that needed to be corrected. No one was under the impression that Schultz engaged in any legitimate State work.

When Jensen was unavailable, Schultz often came to the Jensen Capitol office and told Richard of her fundraising progress. Richard would then pass Schultz's information on to Jensen. Richard needed to coordinate her efforts with Schultz so that Richard, in her own fundraising work for Taxpayers for Jensen, did not contact someone who had just donated. Schultz bounced ideas off of Richard, and asked her if she knew of any donors for particular areas. Richard provided to Schultz copies of lists of persons contributing to Taxpayers for Jensen.

Schultz attended meetings of RACC, which were held in Jensen's Capitol office or, less frequently, in Ladwig's Capitol office, during normal business hours. Jensen typically monopolized the leadership decisions, especially those pertaining to fundraising. There were two types of RACC meetings: to discuss bill payments, or to plan. Richard attended the planning meetings. Others, besides Schultz and Richard, who attended the planning meetings, included legislative aide Greg Reiman, Engels, Ladwig, Jensen, and sometimes Healy. Schultz related at these meetings what she was working on, which candidate she was working with, what events were planned, and what amount of money had been raised. They discussed complaints by lobbyists that they were being "hit up" three times: for Taxpayers for Jensen, for RACC, and for individual members. Jensen indicated at RACC meetings that Republican members were not spending enough time fundraising. He wanted them to be in a continuous push to raise money instead of waiting until the last minute. Richard worked with Schultz on dividing up a list of candidates they were to contact regarding fundraising. There were no discussions or concerns about the fact that Schultz was doing this all on State time and while working out of a State office. The attitude was that because Schultz was located at the ARC, she was "out of sight, out of mind."

Statements of Ray Carey

S/A Blackwood reports that she participated in interviews with Ray Carey, who said that he was ARC director from December 1994 to January 1999, during the period when Sherry Schultz started working for Foti. Carey's statements also included the following. Carey met Schultz after Jensen, Foti, or perhaps Brett Healy told Carey that Schultz was going to have an office at the ARC. Carey never had the impression that it was a temporary assignment; it was an open-ended request for Schultz to have space at the ARC.

Carey said he never saw Schultz involved in legitimate State business, only campaign-related work. When Schultz started doing this at the ARC, it was a new function within the RACC and at the ARC. At times, Carey and Schultz had closed door meetings at the ARC to talk about campaigns. Other times Carey had wanted from Schultz information on where candidates were on their contribution limits, how much more PAC money they could accept, and how much the candidate had to spend. Carey "needed" this information to do his job and to determine RACC money spending. For example, Carey had to evaluate an individual targeted member's race to make a decision if the vulnerable member could do a mail piece and if they could receive money from the Republican Party. Carey came to count on Schultz tracking money going through various campaigns.

The only task Carey ever asked Schultz to do during the time she worked in the ARC space while he was ARC director was to teach campaign workers about fundraising at an RACC Candidate Campaign School on June 30, 1998: how to raise money, put on events, do direct solicitation and write thank you letters. Schultz worked typical banker's hours at the ARC, but would disappear every now and then for part of an afternoon.

While Carey was ARC Director, Jensen, Foti, and Ladwig made comments to him along the lines of, "We don't know a person's party limit, we will check with Schultz," or, "What kind of money is in the treasury to spend, let's check with Schultz." Most people knew which races Schultz was hands-on with and which she was not.

Carey further said that in the fall of 2001, Jensen informed Carey that Schultz was leaving State employment to work at the Republican Party of Wisconsin.

Testimony of Brett Healy

Brett Healy has testified in Dane County John Doe proceeding, 01 JD 06, before the Hon. Sarah O'Brien ("01 JD 06"), in part as follows. Jensen told Healy at the time Sherry Schultz started working for Foti that Foti was willing to lend one of his staffers to assist the Assembly Republican leadership team, which was headed by Jensen.

Healy further testified that Jensen ran leadership meetings. Sometimes the topic of campaign finance would come up, and Jensen would turn to Schultz for information on that topic. During the time Schultz was employed by the Foti Capitol office Schultz prepared call sheets for legislative leaders to use in making fundraising calls and she also kept track of the results of those calls as pledges came in. Sometime after the *Wisconsin State Journal* series came out alleging use of State employees for campaign work, Jensen, Foti, Healy, and perhaps others discussed that they needed someone at the Republican Party of Wisconsin "as soon as possible" to "help the team and help the members," and that Foti was "okay with" having Sherry Schultz join the RPW because "the team needed someone down at the party." Jensen, Foti, and Ladwig agreed that it was going to be more expensive to hire someone with Schultz's experience than someone out of college.

Statements of Jason Kratochwill

Dane County District Attorney Investigator Mark Wysocki ("Inv. Wysocki"), S/A Freymiller, and S/A Strauss each participated in interviews with Jason Kratochwill, and report that he has stated the following in part. Kratochwill was ARC Policy Director from early 1995 to mid-1997 and then ARC director from February 1999 through 2001. When Kratochwill started as ARC Director, Jensen and Foti told him that Schultz would be responsible for individual campaign fundraising, and Ladwig would be responsible for RACC.

When they were both located at the ARC, Kratochwill did not observe Schultz perform any work related to legislative activity. Schultz was engaged almost exclusively in political campaign and fundraising work while at the ARC. When there was not a campaign crunch, Schultz seemed to go on vacation a lot. Prior to Schultz's State employment while located at the ARC, only individuals associated

with individual campaigns did fundraising. Before Foti hired Schultz and leadership located her at the ARC, legislative staffer Virginia Mueller Keleher worked with RACC, PAC money, and individual campaigns. Under Jensen's leadership these roles were split: Ladwig and Judith Rhodes Engels worked on RACC and PAC money, and Schultz worked with individual campaigns.

During the time they were both working at the ARC, Kratochwill observed Schultz in possession of campaign contribution checks at the ARC, observed her copying campaign checks at the ARC offices for extended periods, and knows that she helped candidates fill out campaign finance reports. Schultz also told Kratochwill at multiple times that Schultz was constantly talking with lobbyists regarding campaign contributions.

Kratochwill prepared an organizational chart for RACC in which he listed Schultz as "fundraising coordinator." This chart was shown to Jensen and Foti. For the 2000 election, a phone list was created listing the office, cell, and home phone numbers of Jensen and persons assigned to various campaigns. On this phone list, Schultz was listed as the designated "financial" person. Schultz kept track of campaign funds raised by Jensen and other legislators, known as the "phone crew," for specific candidates, usually those considered vulnerable. Kratochwill observed charts and reports prepared by Schultz reporting on the results of those campaign solicitations.

During the campaign season, weekly Monday morning meetings were held at the ARC offices, which were regularly attended by ARC staff, Schultz and sometimes Jensen. The focus of these meetings was for the ARC staff members assigned to campaigns to provide updates on the campaigns they were working on, including financial updates.

Schultz attended general leadership meetings, which were usually held in Jensen's Capitol office and attended by Foti. Leadership meetings were usually held each Thursday from 2–4 p.m. Schultz was the only Foti Capitol office staff member who attended leadership meetings. At all these meetings fundraising was regularly discussed.

In addition, Schultz sometimes attended "Big 3" meetings of Jensen, Foti, and Ladwig, which in Kratochwill's mind were basically RACC meetings. These occurred weekly during the campaign season, May – November. Schultz mainly worked with Jensen to set dollar amounts for individual candidates to make sure these goals were met. Everyone attending a "Big 3" meeting worked to develop numbers for charts used to track fundraising for candidates, using as targeted dollar amounts the amounts that various legislators could hope to raise from various lobbyists.

Apart from the "Big 3" meetings, Jensen, Schultz, and Kratochwill had separate meetings to develop campaign plans, and late in a campaign season, develop strategies for getting conduit money. Jensen told Schultz to contact

particular groups to find out the size and timing of potential conduit giving. From mid-September on in an election year, Jensen and Schultz talked, to Kratochwill's knowledge, at least a couple of times a week.

While employed by Foti and working at the ARC, Schultz also spent a lot of time organizing and developing an elaborate plan for Election Day to cover every polling location to direct get-out-the-vote efforts in special elections. In one race in particular, Schultz worked on a campaign with ARC employees Brian Dake and Mark Jefferson.

Schultz answered directly to Foti and to a lesser extent, Jensen. In early to mid-1999, Kratochwill spoke with Schultz, Jensen, and Foti about relocating Schultz to non-State property so that she would not be engaging in fundraising on State property. Schultz took the position that if she moved to space owned by the Republican Party there would still be evidence, such as her use of State e-mail, indicating she was a State employee and that it would be too obvious if she did all of her fundraising at Republican party headquarters. Jensen, Foti, and Ladwig opposed moving Schultz because of the expense required to rent space. Jensen asked Kratochwill how much it would cost RACC to rent an apartment for Schultz to work out of. Kratochwill told Jensen that he guessed it might cost about $6,000. Jensen did not think having RACC rent an apartment was a good idea. Sometime after these discussions, Kratochwill moved Schultz out of the main ARC office and into a separate ARC office located adjacent to the main ARC office. After Schultz moved from a cubicle at the ARC to an office space within the ARC, Jensen visited Schultz at the ARC on several occasions that Kratochwill was aware of. On some occasions, after Jensen spoke to ARC staff regarding campaigns, Jensen talked to Schultz in her office or to ARC graphic designer Kacy Hack in her adjoining office.

Kratochwill attended meetings with Jensen and Schultz in Jensen's Capitol office during which Jensen told Schultz who to call to solicit campaign contributions. Jensen directed Schultz to prepare campaign finance plans for vulnerable legislators. Schultz worked very closely with legislative staffer Brian Dake on these plans. Kratochwill reviewed these plans with Jensen and Schultz in Jensen's Capitol office. Jensen would make changes to the plans. It was Schultz's job to monitor legislators' activities to ensure they were following their campaign plans. Schultz also prepared charts and reports showing the amounts of money raised for specific candidates. Schultz distributed and discussed these reports with Jensen, Foti, and Ladwig.

Schultz also presented at campaign schools and provided information on how to raise money, including setting up fundraisers, and regarding campaign finance reports. Schultz stated at these schools that if anyone had questions they should contact her.

In April or May 2000, Kratochwill met with Foti and asked Foti if Schultz could be relocated from the ARC space to the Republican Party of Wisconsin. Foti said no. Foti told Kratochwill that having Schultz located at the ARC was part of Foti's

contribution to Assembly Republican leadership. In addition, Schultz was the fundraiser for Foti's own campaign.

In approximately early to mid-August 2001, Jensen told Kratochwill that Jensen was going to move Schultz away from the ARC, and Kratochwill believes that Schultz was later moved to an annex space in the State Capitol. In addition, in approximately early to mid-September 2001, Kratochwill attended a RACC meeting with Jensen, Foti, Ladwig, and others, one topic of which was the creation of a RACC staff for the "New World," which was a term used to refer to events occurring after the commencement of a criminal investigation into allegations that State resources were used for campaign purposes. They discussed in this meeting the need to retain Schultz because of her fundraising abilities. It was decided that Schultz would leave State employment and become a full-time Republican Party employee, at an estimated cost of over $100,000 for salary and benefits, and would move to the offices of the Republican Party of Wisconsin to continue her work.

Statements of Rhonda Drachenberg

S/A Freymiller reports that she participated in an interview with Rhonda Drachenberg, who said in part the following. Drachenberg was the ARC executive assistant – office manager from March 1997 to August 2000, though she cut back to part-time between January 2000 and August 2000. Sherry Schultz did not work on any ARC or "legitimate" state duties, except that occasionally when things were very busy Schultz would answer the phones. Schultz worked longer hours when election time approached, helping with fundraising for targeted races. Drachenberg worked with Schultz on a Get-Out-the-Vote assignment on the day of an April 1998 special election in Milwaukee. Drachenberg traveled to Milwaukee and helped Schultz with a database list of voters as part of that effort.

Statements of Charlene Rodriguez

S/A Blackwood reports that she participated in an interview with Charlene Rodriguez who stated in part the following. Rodriguez worked in the Foti Capitol office from March 1999 to May 2001. Upon starting in the Foti office, Rodriguez was informed by Foti staffer Michelle Arbiture that Sherry Schultz did fundraising activities. Rodriguez learned that part of Foti's job as Majority Leader was to raise campaign money. Schultz worked directly for Jensen more than Foti.

While Rodriguez was in the Foti office, Schultz worked for a time in a space in the annex of the Capitol before Schultz was moved to the ARC. For a time both Schultz and Jodie Tierney of Jensen's Capitol office used the annex office for political campaign mailings. Rodriguez participated in discussions with Arbiture and Foti about where Schultz should be located. There was no space in the Foti office for Schultz and it was also not practical for Schultz to be in the Foti office because she did not do any legitimate legislative work. It was common for Schultz to come to the Foti office and complain that she always had too much to do with her fundraisers and

related problems. Schultz frequently visited the Foti office to speak to Foti about Foti's own campaign.

Schultz seemed to visit the Capitol on a regular basis for the purpose of Monday morning meetings with Jensen. These meetings between Schultz and Jensen typically lasted more than 30 minutes and varied in length. When Schultz returned from meetings with Jensen, Schultz sometimes commented that she was so busy with her fundraising duties. She complained that people were not making fundraising calls like they were supposed to and helping with invitations Schultz needed to get out. After Schultz's usual Monday meeting with Jensen, if Jensen had follow-up questions, Jensen would follow Schultz back to Foti's office. Jensen asked about individuals who needed money, about how much money a campaign had or how much they were in debt, how much did candidates have in their account, and so forth.

Lobbyists dropped off contribution checks at the Foti Capitol office and the lobbyists said words to the effect of, "This needs to get to Sherry." If the checks came to Rodriguez she would call Schultz or give them to Foti Capitol staffer Michelle Arbiture. It was also common for Schultz to make comments that she was expecting checks to be dropped off at the Foti office. Some lobbyists would call the Foti office looking for Schultz and Rodriguez would then call the ARC and leave a message for Schultz about the call.

Foti would bring in campaign checks that Foti had received at his residence and give them to Schultz. Schultz kept track of the checks and made the deposits.

Schultz had a laptop computer on which she kept campaign-related items. This was likely a State office computer because Arbiture on occasion said that the Foti Capitol office owned a State laptop but now Schultz had it.

After a newspaper reporter began coming around and asking questions at the ARC, Schultz began locking her office door at the ARC.

Testimony of Michelle Arbiture

Michelle Arbiture has testified in 01 JD 06 a Complainant has reviewed transcripts of those proceedings, which reflect testimony of Arbiture that includes the following. Arbiture has worked in the Foti Capitol office since 1997. The only projects that Arbiture recalls working on with Sherry Schultz during the time when Schultz was employed by the State on the Foti payroll was when Schultz asked Arbiture to proofread campaign finance reports for Foti as a candidate. Schultz asked Arbiture to use the Foti Capitol office constituent database to make sure the Foti campaign finance reports were current. Schultz coordinated envelope stuffing projects for campaigns at the ARC during 2000, including one for a Foti fundraiser for which Schultz created the invitation.

Testimony of Michael Heifetz

Michael Heifetz has also testified in 01 JD 06, testifying in part that he began working in the Foti Capitol office in December 1997 and worked in that office continually through at least 2001, focusing on legislative policy. Heifetz was never aware from any source that Schultz did any legitimate State work. Schultz occasionally commented at meetings attended by Foti about how different representatives were doing as candidates in raising money. Heifetz recalls Schultz making no other statements during meetings.

Statements of Rose Smyrski

S/A Freymiller reports that she participated in an interview with Rose Smyrski. Smyrski made statements that included the following. Smyrski worked as a legislative assistant for a State Representative between January and December 2000. During 2000, Smyrski also worked on the campaign of an Assembly candidate (a different person).

During 2000, Smyrski worked on two or three campaign finance reports using her personal laptop computer at home, using software that she believed was created by Paul Tessmer, a State employee located at the ARC. Whenever Smyrski had a problem with the software, she either called Tessmer or took her laptop over to his office at the ARC.

Smyrski met Sherry Schultz when Smyrski went to the ARC to stuff envelopes with campaign literature on at least five occasions. Schultz was good at coordinating envelope stuffing and collating documents, usually invitations to fundraisers or fundraising letters.

Schultz helped with campaign finance issues in the campaign that Smyrski worked in 2000, including contacts with the campaign treasurer in a city in northwestern Wisconsin. At one point, Smyrski asked the campaign treasurer for a copy of Paul Tessmer's software that had campaign information entered on it. Smyrski used the disk to generate a list of names of persons to send thank-you's to. Schultz called Smyrski with the names of potential donors to contact for the race. Smyrski attended fundraisers in this race and had the candidate call potential hosts for the fundraisers and came up with a list based in part on information Schultz provided to Smyrski.

At one point after June or July 2000, Schultz asked Smyrski if Smyrski would be interested in "coming over" to work at the ARC and help Schultz. Schultz said Smyrski would have a specific issue area, and Smyrski could also help Schultz with campaign finance work. Schultz said she would "groom" Smyrski so that Smyrski could eventually take over Schultz's duties, and Schultz could move on to something else. Schultz explained that she was "frazzled, stressed-out." Smyrski believed that associating herself with Schultz would be a good career move, since Schultz "seemed connected with the Speaker's office."

Schultz worked with campaign finance reports that were time sensitive and had to be very accurate. Schultz had stacks of phonebooks in her office that she used to verify addresses that appeared on the campaign finance reports. In doing this work, Schultz used Tessmer's software. Schultz, Tessmer, and Smyrski talked about ways to improve the software. Smyrski is not aware of any duties Schultz had other than those related to campaign finance and fundraising.

Statements of Lee Riedesel

S/A Freymiller reports that she participated in an interview with Lee Riedesel who states in part the following. Riedesel was employed at the ARC as a graphic artist from June 2000 to December 2001. While he was a State paid employee of ARC, Riedesel completed 25-30 campaign fundraising invitations for Schultz at her request. He also created reply cards, thank you cards and donation cards and worked with Schultz on creating these documents. Schultz also kept the books for various fundraisers, recording amounts contributed. Riedesel was not aware of any work other than fundraising performed by Schultz during the time they both were in the ARC space.

Riedesel further said that he walked through Schultz's office to get to his office. After the *Wisconsin State Journal* began its investigation involving the ARC in the fall 2000, Schultz wanted the door to her office always locked. Schultz seemed agitated that a reporter was coming around to the ARC offices. Schultz told Riedesel that her work was sensitive. In May 2001, when the newspaper articles appeared regarding the caucuses, Schultz told Riedesel that Schultz could be in a lot of trouble, maybe facing jail, if people found out what she did. Schultz said that what Schultz did would get her into a lot more trouble than what the graphic artists did.

Testimony of Eric Grant

Complainant is aware that Eric Grant has testified in 01 JD 06. Grant testified in part that he was employed at the ARC from August 1995 to April 2000 as a graphic artist. Grant worked with Sherry Schultz extensively designing invitations for fundraisers. Schultz was the person legislators and staff at the ARC came to for fundraising materials, and she spearheaded fundraising efforts for the RACC.

Statements of Judith Rhodes Engels

S/A Strauss reports that she has participated in interviews with Judith Rhodes Engels ("Engels"), who has stated in part the following. Engels was state-employed in the Ladwig Capitol office November 1996 - March 2001. Sherry Schultz was in charge of fundraising for individual Republican members of the Assembly, including completing their campaign finance reports and assisting in fundraisers. After the 1998 elections, Engels and Ladwig discussed the fact that Schultz was "creating a

monster" in that legislators were becoming too dependent on Schultz and her campaign finance related services. Engels worked with Schultz on fundraising issues. Schultz did not appear to have any duties other than fundraising. Engel's job was to keep track of contributions from legislators to RACC, which are referred to as "assessments." Schultz's duties included keeping track of where this money went for the individual campaigns. On occasion Engels received checks for individual campaigns and provided them to Schultz. Schultz created various documents regarding fundraising at RACC meetings held in Jensen's Capitol office. In a RACC meeting after the 2000 election in Jensen's Capitol office, Jensen thanked Schultz for all she did for members of the "team" in connection with the money that had been raised.

Statements of Brian Dake

Investigator Wysocki and S/A Strauss each participated in interviews with Brian Dake, and report that he has stated the following in part. Dake worked at the ARC from December of 1997 to January 2000 and in the Jensen Capitol office beginning in January 2000. While at ARC in 1999, Dake attended leadership meetings at Jensen's Capitol office with Schultz at which Jensen, Foti and Ladwig were usually present. During some of these meetings, Dake and Schultz discussed fundraising by the vulnerable and freshman legislators. Dake worked with Schultz in creating campaign finance plans for legislators as part of her ARC duties. Schultz worked on get-out-the-vote efforts in special elections in 1999 and Schultz was recognized during a leadership meeting for this work. Her get-out-the-vote efforts in campaigns were based in part on voter lists created by ARC staff.

Schultz was almost exclusively engaged in fundraising related work during Dake's time at the ARC. When Dake first started at the ARC, Schultz was reviewing campaign finance reports and working on a database of contributions to Assembly Republicans. While he was an ARC employee, Dake worked on various campaigns. During these campaigns he discussed with Schultz the receipt of money for the campaigns, including letting her know when certain contributions were received by candidates. Schultz called Dake to ask if certain contributions had been received. Dake observed Schultz talking to other ARC staff members regarding the same sort of information.

Dake also said that he observed Schultz working with Paul Tessmer to create a database for the preparation of campaign finance reports.

In 1999 Dake started to develop plans to assist freshman and vulnerable legislators. Schultz's role in this ARC project was to assist in issues relating to fundraising. Part of Schultz's duties in this area included creating fundraising goals for candidates and providing advice and assistance to these legislators on fundraising. Dake believed that prior to 1999, Schultz was involved in tracking contributions for RACC and individual members.

In 2000, when Dake was employed by the Jensen Capitol office, Dake took partial leave from his State employment to work on campaigns and continued to work with Schultz regarding fundraising. In the summer or early fall of 2000, during an ARC campaign staff meeting, Schultz or Kratochwill stated that Schultz was coordinating PAC and conduit money. Dake usually contacted Schultz at the ARC office to discuss fundraising with her during campaigns.

During fall 2000, Jensen occasionally called and also visited Dake while Dake was working on campaigns in the Green Bay area. Jensen asked how a campaign was doing for money. Dake typically replied "fine" and indicated that Schultz was very helpful. Jensen would agree.

Statement of Garey Bies

S/A Strauss reports that she participated in an interview with State Rep. Garey Bies, who said the following in part. Bies won an election to the Assembly in November 2000. After the election, Sherry Schultz, whom Bies had not met before, stopped by his Capitol office and asked how his campaign funding was. Bies responded that he was a little in debt. Schultz replied that if Bies wanted to do a fundraiser, Bies should call Schultz. Bies did not take Schultz up on the offer. Bies never discussed any legislative issues with Schultz, then or since.

Statements of Amy Petrowski

DCI Special Agent Lisa Wilson ("S/A Wilson") reports that she participated in an interview with Amy Petrowski, during which Petrowski made statements that include the following. When she was working on a campaign for a candidate for the Assembly in early 2000, Sherry Schultz called to tell Petrowski that some political action committee money was coming to the campaign, though Schultz did not specify an amount. Following this, the campaign did receive PAC money.

Statements of Matthew Tompach

S/A Wilson reports that she participated in an interview with Matthew Tompach, a former ARC employee, during which Tompach made statements that include the following. Then-ARC Director Ray Carey introduced Schultz to the ARC staff when she arrived at the ARC, saying that Schultz would be helping Carey on special projects. Schultz worked near Tompach at the ARC from the spring of 1998 until shortly after the 1998 election, when Schultz moved into a separate office at the ARC. As far as Tompach knew, Schultz kept fairly normal business hours at the ARC. Schultz was not there when other staffers would work late during long legislative sessions. Tompach was not aware of any legitimate State work that Schultz did. Schultz was paged at the ARC office fairly frequently to call Foti. Ladwig was not at the ARC office often, but she called for Schultz on occasion. Tompach attended most of the Monday morning campaign meetings at the ARC in

1998. Schultz gave Tompach money for a candidate, whose race Tompach was working on.

Statements of Carolyn Hughes

S/A Wilson reports that she participated in an interview with Carolyn Hughes, during which Hughes made statements that included the following. At a time when Hughes was working for a State representative, sometime before May 2000, Hughes participated in meetings with her boss, the state representative, Sherry Schultz, and Brian Dake in the Representative's Capitol office. These meetings consisted of discussions regarding the Representative's campaign finances, campaign fundraising timeline for the Representative as a candidate, the amount of money the campaign was supposed to have by a certain time, the amount of conduit and PAC money the campaign could expect to receive, and the status of campaign finance plans. Schultz also inquired about press releases, constituents, and constituents' responses to the Representative. Schultz and Dake also provided the names of potentially supportive constituents, and conduit and PAC money contacts in the Representative's district that the Representative should contact. Hughes was never aware of any legitimate State work that Schultz did.

Hughes began working at the ARC in May or June 2000. Everyone knew that Sherry Schultz was the "money person" and the "fundraising lady." When Hughes started at the ARC, Schultz expressed excitement because Hughes also had a campaign fundraising background. Hughes and Schultz commiserated about the work that fundraisers have to do and how the work is sometimes under-appreciated.

Schultz asked Hughes for help on fundraisers. Hughes provided to Schultz copies of fundraising letters because Schultz sometimes had a hard time composing fundraising letters and Schultz liked Hughes' writing style. Hughes assisted Schultz with envelope stuffing.

After Hughes moved to northern Wisconsin full-time to work on an Assembly campaign in August 2000, Hughes assisted Schultz by providing a list of invitees for a campaign fundraiser. Hughes e-mailed the invitees list to Kacy Hack of the ARC to coordinate with Schultz. It was understood during 2000 that Schultz was the person to contact with any questions on campaign finance reports and that everyone would reach her by calling the ARC office.

In working on an Assembly campaign in October 2001, Schultz provided assistance while working out of the Republican Party of Wisconsin. During the course of a meeting at a restaurant with persons who included Schultz, Schultz advised the candidate that "leadership" was going to help out with his campaign. Schultz set up fundraising events, found hosts for fundraisers, worked with legislators to raise money for the campaign, and helped the treasurer with the campaign finance reports.

Statements of William Cosh

S/A Wilson participated in interviews with William Cosh, and reports that his statements included the following. Cosh worked at the ARC from March 27, 2000 to April 2, 2001. Sherry Schultz used a personal laptop computer and was secretive about what she printed out at the ARC. Schultz worked with legislators to help them coordinate fundraisers, including working on invitations, event sponsors, and donor lists. On about 5-10 occasions, when he worked at the ARC, Cosh assisted Schultz in making calls from the ARC to persons on donor lists. Cosh described these as follow-up calls to potential donors who had received written solicitations. Schultz provided Cosh with the donor list and the written solicitation. Cosh then made the calls, approximately 30-40 a night, and reported back to Schultz on the results of the calls.

Cosh also assisted Schultz with fundraising mailings at the ARC office. It was Schultz's responsibility to get materials together, make sure the items were printed out correctly, and then stuffed and mailed out. Cosh also assisted Schultz in setting up fundraising events. Schultz told Cosh that she called legislators and requested that they donate certain amounts from their campaign funds to the campaign funds of other legislators who were in greater need. Cosh is unaware of any policy or legislation areas Schultz worked on during the time she was located at the ARC.

Schultz told Cosh that Schultz attended Assembly leadership meetings involving fundraising, fundraising goals and specific races. Schultz told Cosh that Jensen wanted her to make fundraising calls, raise money for specific races, and call lobbyists and legislators for specific races or candidates. Schultz also told Cosh that she discussed specific contribution checks received involving unusual amounts with Jensen. At the end of the 2000 election cycle, Schultz told Cosh that when lobbyists submitted contribution checks for a specific dollar amount but with no payee, Schultz and Jensen would decide who the payee would be and write in that campaign's name on a given check.

Statements of Paul Tessmer

Investigator Wysocki and S/A Freymiller, each participated in interviews with Paul Tessmer, and report that he has stated the following in part. Tessmer was employed by the ARC from May 1998 to December 2001. During his employment at the ARC, Tessmer worked with Sherry Schultz in creating a database to assist in dealing with filing campaign finance reports with the State Elections board. This came about in early 1999, when Brett Healy of the Jensen Capitol office asked Tessmer to come up with a way to computerize campaign finance reports. Healy expressed frustration with a program that ARC employee Kathy Nickolaus had created. Once Tessmer created this program, Schultz used it to work on campaign finance reports and helped Tessmer identify bugs in the program.

A large number of Assembly members and staff visited Schultz at the ARC shortly before campaign finance reports were due. Tessmer observed Schultz organize fundraising events including the preparation and mailing of invitations.

In addition, Schultz asked Tessmer at the ARC to "mail merge" data from disks for the purpose of creating lists for fundraising events. Tessmer does not recall discussing any legislative policy issues with Schultz.

Statements of Tom Petri

S/A Freymiller reports that she participated in an interview with Tom Petri, who identified himself as an ARC employee from March 2000 to October 2001. Petri stated in part that while employed at the ARC he observed Schultz print campaign-related materials, including fundraising invitations. Schultz often hooked her laptop to an ARC printer near Petri to print invitations and other campaign-related items. Schultz sometimes came around seeking volunteers to stuff envelopes with campaign materials. Petri assisted Schultz in preparing and mailing fundraising related materials. Schultz's job was to coordinate fundraising for various candidates, and act as a go-between for candidates and lobbyists. Schultz was also involved in organizing fundraisers. Petri was not aware that Schultz worked on any policy issues while employed at the ARC and did not believe that she had any policy issue assignment.

After the *Wisconsin State Journal* series appeared in May 2001 alleging widespread use of State resources for campaign activities, Schultz told Petri that she had to "clean up the office," meaning that she wanted to remove campaign items from her ARC space. Shortly after this conversation, Petri walked through Schultz's ARC office and noticed that it had been cleaned out. In or about November of 2001, Petri spoke with Schultz who told him that she was now working at the Republican Party. At that time, Schultz said in regard to the investigation into use of State resources for campaign purposes, "If I'm going down, everyone's going down with me."

Testimony of Roger Cliff

Roger Cliff has testified in 01 JD 06, in part as follows. Cliff is a lobbyist. In the 2000 election cycle, Cliff received calls from Schultz requesting PAC campaign contributions for various candidates. These calls occurred during normal business hours.

Statements of Patrick Essie

S/A Blackwood participated in an interview with Patrick Essie, and reports that Essie has stated the following in part. Essie identified himself as a lobbyist. Schultz contacted Essie during campaign seasons in 1998 and 2000. These calls from Schultz followed conversations Essie had with Jensen in which Jensen requested specific amounts of money for specific candidates. During the 2000 election cycle,

Schultz told Essie that she was calling on behalf of Jensen, to raise money for other identified Assembly candidates. Checks went to Schultz, and Essie talked about the status of checks with Schultz.

Testimony of James Buchen

James Buchen has testified in 01 JD 06 in part as follows. Buchen is a lobbyist. Schultz called Buchen to solicit campaign contributions regarding a number of hotly contested races, including the 2000 election cycle. Buchen received these calls from Schultz during the day.

Testimony of Richard Graber

Richard Graber has testified in 01 JD 06 in part that he was Chair of the Republican Party of Wisconsin (RPW) during the fall of 2001. During that period, Jensen and Graber talked about providing sufficient staff to the RPW to engage in the political activities necessary to elect representatives. Jensen recommended to Graber that the RPW hire Sherry Schultz to handle campaign fundraising. Graber was certain that Jensen felt Schultz was qualified to do that. No one had filled this role at the RPW before to Graber's knowledge. Jensen said Schultz should receive in salary roughly what she had been paid as a State employee. The RPW agreed to this. Sherry Schultz currently works full-time, regular hours on fundraising while located and being paid by the RPW, raising money and organizing fundraisers. She is busy at this job; there is plenty for her to do.

Statements of Lyndee Wall

S/A Freymiller reports that she has participated in interviews with Lyndee Wall, who has stated in part the following. Wall stated that she was an employee of ARC from July 2000 to March 2001, as an assistant to Kratochwill. During Wall's time at the ARC, Sherry Schultz was in charge of fundraising. On one occasion Wall offered to help Schultz clean up her office, meaning get rid of campaign-related items. Schultz replied that she did not have a single legitimate item in her office.

Statements of Stacy Ascher-Knowlton

S/A Wilson reports that she participated in an interview with Stacy Ascher-Knowlton, who said in part the following. Ascher-Knowlton served as campaign treasurer for an Assembly Republican candidate in northern Wisconsin during 2000. During that campaign, Ascher-Knowlton talked frequently with Sherry Schultz, mostly regarding campaign finance reports, and Schultz would inquire about the type and quantity of fundraisers they were planning. Ascher-Knowlton had Schultz's work and home telephone numbers.

During the course of their work together, Schultz told Ascher-Knowlton to expect contributions to the campaign. Schultz sent envelopes containing checks for

the campaign from political action committees. Ascher-Knowlton asked Schultz why the campaign was receiving this money. Schultz responded that they had a caucus at which a lot of money was raised, and that Ascher-Knowlton's candidate was receiving some of this money because he was the challenger in a heated race. Schultz further told Ascher-Knowlton that once her candidate was elected, the candidate's campaign would have to raise more of his own money, and Schultz would be asking the campaign to give some of that money to other races. Schultz said that if candidates did not give money back when Schultz requested, then the campaign would not receive any more money in the future. Ascher-Knowlton further said that even during the 2000 campaign, Schultz directed her to give money to certain other campaigns, which the campaign Ascher-Knowlton was working on did.

Statements of Scott Jensen

On September 18, 2002, Jensen stated to your complainant in part the following. Jensen said that during the time Schultz worked for Foti, Jensen did not know what Schultz's duties were. He said he understood that Schultz "volunteered" to help Republican candidates with fundraising work. Jensen said that he had never been in Schultz's office.

Jensen further said that during 2000, he would "pretty regularly" talk to Schultz regarding fundraising. These conversations normally took place at the Republican Party of Wisconsin's headquarters, by telephone (either cell phone or at Jensen's home), or at Jensen's Capitol office over the lunch hour.

Jensen further said he believes that State employees should not raise or discuss raising campaign money at all on State time. Legislators may come up to Jensen to talk about re-election issues involving their campaigns, but no phone calls or state telephones are used between any legislators and himself for fundraising details.

FACTS AS TO COUNT TWO (SCHULTZ): OFFICIAL MISCONDUCT IN OFFICE RELATED TO FUNDRAISING ON STATE TIME USING STATE RESOURCES

Complainant swears, reaffirms, and incorporates here by reference in connection with Count Two all facts related in this complaint in connection with the Background Facts, and Counts One, Three, Four, and Five of this complaint.

FACTS AS TO COUNT THREE (JENSEN): OFFICIAL MISCONDUCT RELATED TO THE ACTIVITIES OF RAY CAREY, JASON KRATOCHWILL, AND OTHERS

Complainant swears, reaffirms, and incorporates here by reference in connection with Count Three all facts related in this complaint in connection with the

Background Facts, and Counts One, Four, and Five, of this complaint. In addition, complainant further swears and affirms as follows.

Statements of Ray Carey

S/A Blackwood reports that she participated in interviews with Ray Carey, former ARC director. In addition, Carey testified in 01 JD 06, a transcript of which complainant has reviewed. The following is derived from those sources.

When Carey was hired to be ARC Director as a full-time State employee in December 1994, Carey knew that his responsibilities in that job would include recruiting candidates to run for office, being chief manager of campaigns of candidates for the Assembly on the Republican side, being executive director of RACC, and helping vulnerable incumbent Republicans keep their seats. Carey's main function was to "get the majority elected or reelected." Carey's biggest need during campaign season was for people to work in the field on campaigns.

Jensen was the legislative leader in charge of Assembly Republican campaigns in 1994. Jensen was active in the operation of RACC during the 1996 and 1998 elections, directing RACC meetings in 1996 and running them in 1998.

Legislative leadership, including Scott Jensen, expected Carey to recruit candidates as ARC Director and RACC Executive Director. In handling candidate recruitment while Jensen was Speaker, Carey regularly briefed Jensen on the trips Carey was making and pitches Carey was making to potential candidates, including the kind of "seed money" that Assembly leadership could get to the candidates' campaigns.

After Jensen became Speaker in November 1997, all meetings, including RACC meetings, shifted from various places, including the ARC, into Jensen's Capitol office. Carey's work for these meetings included tasks such as creating a RACC plan for a campaign cycle, as he did in 1996. In 1998, Sherry Schultz answered financial questions at RACC meetings, along the lines of, "How much party money does this person have?"

In February 1998, a day-long RACC strategy session was held at the ARC, probably on a weekday, attended by persons who included Jensen, Foti, Ladwig, and Carey.

During RACC or Leadership meetings while Carey was still ARC director, there was discussion about how there had been too much work for one graphic designer at the ARC. This was discussed as part of the shortcomings of campaign work in the election cycle. Carey believed that all of the Speakers Carey worked with knew that the ARC graphic artists created campaign materials. Eric Grant, the only graphic artist at the ARC when Carey was there, was overwhelmed with work.

Carey further said that it was "routine" for publications to run articles alleging that the State was paying employees to work at campaign oriented partisan caucuses. The general attitude at the ARC and with leadership was that such articles come and go, and could be disregarded. Carey believed that Jensen's reaction to one such critical article that listed the salaries of ARC staffers was words to the effect of, "Don't worry. This is going to happen as long as you are caucus director."

Statements of Rhonda Drachenberg

S/A Freymiller reports that she participated in an interview with Rhonda Drachenberg, who said in part the following. Drachenberg was executive assistant – office manager at the ARC from March 1997 to August 2000, though she cut back to part-time between January 2000 and August 2000. When Drachenberg started work at the ARC, then-ARC Director Ray Carey instructed Drachenberg to work on a potential candidate database at the ARC. In January 1998, Drachenberg began managing the database, adding to it and sending out mailings to potential candidates.

Drachenberg was also in charge of maintaining a spreadsheet that kept track of the percentage and amount of time a state employee reduced his or her state pay in order to work on campaigns. First Carey and later Kratochwill told Drachenberg which employees to add to the spreadsheet. Drachenberg then contacted then Chief Assembly Clerk Charlie Sanders to find out each person's salary. She entered the salary into the spreadsheet and came up with the amount that needed to be reimbursed to the person in order to make up the difference. Drachenberg then coordinated with the Republican Party of Wisconsin to get reimbursements for the employees. Sometimes the campaigns paid for the reimbursement instead.

When Jason Kratochwill had Drachenberg create a memo addressing "potential candidate procedures" for the use of Lyndee Wall, who was joining the ARC staff, Kratochwill instructed Drachenberg to include words in the memo to the effect of, "Never, ever tell anyone that you are working on something for RACC, this would cause serious problems."

Testimony of Eric Grant

Eric Grant has testified in part, as follows, in 01 JD 06. Grant was employed at the ARC from August 1995 to April 2000 as a graphic designer. Grant was a full-time State employee throughout his employment at the ARC. Between June 1 of an election year and Election Day, 99% of Grant's time would be spent on campaign-related work. State work was given a lower priority than campaign work by Ray Carey and Jason Kratochwill.

Grant participated in two discussions with Jensen following the November 1998 election in the Jensen Capitol office. The first was in the nature of a "pep" talk about the great job Grant was doing. The second was to firm up specifics about

hiring a second graphic artist and possibly a third staffer to work on the ARC website full time.

Grant did quite a bit of graphics work for Jensen, including campaign work. Jensen sent Steve Baas or Carrie Hoeper Richard to the ARC in connection with the graphics work.

The offices of all but two or three of the Representatives on the Republican side of the Assembly brought Grant campaign work to do at the ARC.

Statements of Jason Kratochwill

Investigator Wysocki, S/A Freymiller, and S/A Strauss each participated in interviews with Jason Kratochwill, and report that he has stated the following in part.

Kratochwill said Ray Carey has confirmed to him that Carey provided to Foti, Jensen, and a third legislator a memo dated February 17, 1997, "Review of '96 Campaign," that includes the following references:

- "Recommendation: Leadership should make it clear that staff is required to volunteer for campaign work, and that they should specifically instruct their staff to do so."
- "Scott and I made the decisions on where and when to buy TV...."
- "Todd Rongstad [then an ARC employee] wrote much of our literature and direct mail. Eric Grant [then an ARC employee] designed over 300 separate pieces.... Over two million pieces of RACC-produced literature was distributed statewide—half of it by mail."
- "Staff had great praise for [then Jensen Capitol staffer] Steve Baas' assistance during the campaign. It was wise to have a single dedicated person to help campaigns with earned media efforts."
- "Baas' work during the campaigns was ... largely reactive to requests from Scott or the few staffers that understood the value of earned media."
- "The biggest problem with candidate recruitment was that I [Carey] did 90% of it with no help from the party and little help from legislators (except for phone calls from the leadership)."

Kratochwill said more ARC staff worked on the 1998 election than during the 1996 election due to the aggressiveness in trying to hold the majority in the Assembly. Between early 1995 and early to mid 1997, Jensen was in charge of campaigns. Jensen came to the ARC to "call the shots" regarding campaigns.

Jensen officially used a committee of legislators to select Kratochwill for the ARC director job in February 1999, but, in fact, Jensen picked committee members so that Kratochwill would get the job. Jensen and Kratochwill had a series of discussions about the job apart from the formal process. In one of these discussions, they focused on RACC issues. Kratochwill had a separate discussion with Foti on

RACC issues. In Kratochwill's discussions with Jensen, they talked about which campaigns should be targeted and why, and how to organize the RACC structure. Jensen told Kratochwill that Jensen wanted to shift campaign resources to vulnerable candidates. It was Jensen who offered the job to Kratochwill.

During the time Kratochwill was ARC Director, Jensen both macro-managed and micro-managed the ARC and all Kratochwill's important activities. During Assembly campaign races, Kratochwill knew what was happening on a daily basis, and Jensen was just as familiar as Kratochwill with the details. The two men spoke often and without regard to whether Kratochwill was on State time or either of them was using State resources, dealing with such issues as: recruiting candidates; which districts to do polling in; how to get ARC and legislative staffers to agree to work on particular campaigns; who to run ads for in what medium; how to staff and fund campaigns; what opposition research was needed; which "vulnerables" had the best chance of winning; and many other campaign issues. At no time did Jensen direct Kratochwill to take leave time or otherwise perform this work off State payroll.

After Kratochwill accepted the job offer, Jensen told Kratochwill that one of Kratochwill's primary duties, a major part of his job, would be candidate recruitment and running names past Jensen. As part of these duties, Kratochwill traveled to interview potential candidates, sometimes with Jensen, using a database of information on candidates. Former ARC Director Ray Carey had started a potential candidate database at the ARC that Kratochwill continued to maintain, and copies from this database would be given to Jensen. One field in the upper right corner indicated "Speaker Contact," namely whether Jensen had talked to the candidate.

Jensen accompanied Kratochwill on some candidate recruitment trips. During one such trip, in May 2000, Jensen told a potential candidate in northeast Wisconsin that Jensen could help the candidate with campaign mail, raise money, design literature, and provide full-time people to staff the campaign. Later, Jensen, Foti, and ARC Deputy Director Mark Jefferson flew to the same district to recruit a second candidate after the first potential candidate decided not to run. After Jensen sent Jefferson and Brian Dake to work on this campaign, Jefferson was listed as working 20% of the time on this campaign and 80% for the State, but instead worked virtually full-time on this campaign over the course of nine weeks. (Dake was hired to work as a legislative staffer in the Jensen Capitol office from the ARC shortly after this race.) In a similar vein, Jensen promised a central Wisconsin area candidate cash, funding, staff, and help with campaign literature, the staff being ARC staff. Three different ARC staffers worked on the race after the candidate requested additional help.

Jensen wanted an update on candidate recruitment in the summer of 1999, in response to which ARC Deputy Director Mark Jefferson wrote a memorandum on short notice, dated August 2, 1999. Kratochwill and Jensen discussed this memo in Jensen's Capitol office shortly after Jefferson completed it. The two went through the memo, with Jensen making comments on various potential candidates.

During the time Kratochwill was ARC Director, Jensen participated in meetings in which it was discussed in detail which staff persons and what percentage of ARC staff and legislative staff time would be used on State time versus on "RACC time." Kratochwill gave a specific example of a directive of Jensen to Kratochwill in connection with the November 2000 RACC payroll. The directive was for one particular legislative staffer whom Jensen considered to be a "weak" campaigner to be shifted to a "weak campaign," freeing up "stronger" campaigners for campaigns with better prospects for the Republican candidate.

Sometimes Jensen made campaign-related contacts to Kratochwill through Jensen's Capitol staff, not directly by Jensen himself. For example, Jensen Capitol office Chief of Staff Brett Healy called Kratochwill at the ARC to report that the Republican Party would be giving a large financial donation to a particular independent expenditure group, because Jensen needed Kratochwill to know that this donation was being made as part of overall strategies to help Republican candidates for the Assembly.

Kratochwill and Jensen discussed how to get Capitol legislative staffers out working on campaigns through SWARM (Staff Working For Assembly Republicans), which began in 1996. Jensen told Kratochwill that they needed "SWARM people," meaning staffers in the Capitol offices of Representatives, to sign up to do campaign work.

One of the early documents that Kratochwill created for Jensen was a memo, dated March 1, 1999, stamped PERSONAL & CONFIDENTIAL, which included a draft ARC organizational chart listing two graphic design positions, one which was filled and the other which Kratochwill wanted to create. After Kratochwill became ARC director, he made a pitch to Jensen to create a second graphic artist position at the ARC as a new State job. Kratochwill told Jensen that Grant was a good graphic artist and the Assembly couldn't afford to lose him going into the 2000 election year. Jensen was the hiring authority to create the new position that was created, for which Kratochwill hired Kacy Hack.

Jensen personally worked with Hack, who worked under the direction of Kratochwill. Jensen knew where Hack worked, and was familiar with her office. Jensen Capitol office staff member Steve Baas told Kratochwill that Hack did work for Jensen. Kratochwill estimated that the campaigns of 50 of the 56 Republican members of the State Assembly used the ARC for campaign purposes that included graphic design work.

Kratochwill's March 1, 1999, memo to Jensen also included a description of a potential new State employee hire to the ARC who would have the following "confidential" duties: "deconstruct 1998 (2000) target races; organize, coordinate staff training and campaign schools, assist in development of 2000 strategy and organization design, compilation of polling, targeting, and demographic data; GOTV

[meaning Get Out The Vote] re-design; list development and management." This memo was copied to Healy and Jefferson, both full-time State employees.

Jensen ran five basic types of meetings that Kratochwill was familiar with, all in the Jensen Capitol office. Typically these meetings were held during weekdays, and not at any particular time of day except that Leadership Meetings tended to be scheduled for Thursdays, 2-4 p.m. The five types of meetings were: (1) Jensen Capitol office staff meetings, which Kratochwill was welcome to attend; (2) "Big 3" meetings for Jensen, Foti, and Ladwig, focused on RACC planning and progress and attended by some staff such as Kratochwill and Schultz, held weekly during the campaign season and lasting anywhere from fifteen minutes to four hours; (3) "Leadership Meetings" for a longer list of legislators and staff, held informally about twice a month, when RACC could sometimes be discussed; (4) "Secret Leadership Meetings," as needed with limited staff; and (5) "Super Secret Leadership Meeting," where no staff was allowed. A fundraising report was given at every "Big 3" meeting. At least two of the Super Secret Leadership Meetings occurred after the May 2001 articles appeared alleging use of State resources for campaign purposes.

On Monday, March 6, 2000, a big RACC strategy meeting took place at the ARC as directed by Jensen, scheduled to last all afternoon. Jensen, Foti, and Ladwig attended. State employees who attended included Kratochwill, Rhodes, and Mark Jefferson. Jensen said they needed this meeting because they were getting close to an election period. A loose 2000 RACC budget was discussed. One presentation at this meeting on State property was given by two State employees, Kratochwill and ARC employee Patrick Lanne, regarding the 2000 RACC polling plan. Lanne was responsible for polling plans at the ARC. Lanne came to work at the ARC because he believed that Jensen was going to run for governor.

Kratochwill gave another presentation regarding how many total legislative and ARC staff members were going to be needed to work on key campaigns. The specific breakdown of ARC versus legislative staffers was not discussed because everyone at the meeting knew that more than 20 field staff would be necessary and the ARC is not that large, so the rest would have to come from the Capitol.

During summer and fall 2000, Kratochwill accompanied Jensen to three to five meetings at Wisconsin Manufacturers and Commerce (WMC) in Madison with "the four horsemen": lobbyists from the Farm Bureau, the Wisconsin Builders Association, the Wisconsin Realtors Association, and WMC itself. The early meetings focused on potential campaign issues and the later meetings on particular campaigns. Jensen indicated where money from lobbyists' clients would be the most helpful, and suggested whether lobbyists should be giving money directly to campaigns or as independent expenditures. At these meetings, Kratochwill reported on who was working on certain races, what the issues were in the campaigns, and what the polls were saying. Lobbyists talked about potential commitments. For example, the Realtors lobbyist explained in one meeting that the Realtors were going to send out a mailing to "inoculate" a Republican candidate against a particular

potential allegation. In learning that lobbyists planned to spend on a particular race, Jensen and Kratochwill could determine how limited RACC funds could be focused on other races. The meetings were in part to help Jensen, with input from Kratochwill, prioritize Assembly Republican spending.

One topic of a WMC meeting was an advertisement that was about to air that had been written and produced by an out-of-state company, based on a series of interviews that company representatives held with Assembly candidates at the ARC offices over the course of two days in July 2000. Jensen and Foti sat in on these interviews at the ARC. The out-of-state company had been awarded the contract for this work at or around July 14, 2000, during a meeting in the Jensen Capitol office attended by persons who included Jensen, Foti, and Ladwig.

Jensen knew that then-ARC employee Kathy Nickolaus developed a campaign finance software program that Nickolaus tried to sell for a profit. Jensen knew about this in part because Richard used this software when she worked on Taxpayers for Jensen out of Jensen's Capitol office.

As part of his extensive duties in connection with the RACC budget, Kratochwill decided which ARC and legislative staffers were going to go off the State payroll and what their percentages of State and non-State time were. These proposals went to Jensen and Ladwig. It was clear to all that these were "phony" numbers, and that staffers were in fact to be out in the field so steadily in the months before the election, working the campaigns full-time, that they were paid by the State for many of those hours. As an example, even though one particular Jensen Capitol office staffer, Brian Dake, was listed as being off of the State payroll 50%, Jensen knew that Dake was working on a campaign 100% of the time. Jensen told Kratochwill that Dake was going to be totally available to work on campaigns without any time frame limitations on the campaign work. Jensen signed off on a 50% leave for Dake, which was the largest percentage any staff person took off to work on a campaign. In addition, Kratochwill and Jensen talked about State employee campaigners working full-time on various races. Whenever there was discussion of someone being a "campaign manager," it was understood that this was a full-time job once the campaign was underway.

In 2000, Jensen expressed concern to Kratochwill that an ARC staffer had not been sent out to work on a tight race earlier than May 2000. This was one of those races in 2000 for which Jensen wanted campaign staffers sent to the field as early as May, even though RACC was not willing to spend salary money that early.

Kratochwill, Sherry Schultz, Brett Healy, and Judy Engels of the Ladwig Capitol office were listed as recipients of a handwritten memo from Jensen dated October 16, 2000, in which Jensen focused on "Monday afternoon's meeting" of Jensen, Foti, Ladwig, and another Representative in which "we will need to focus on raising and directing dollars for the final push in the campaigns." In this memo, Jensen directed the three State employees to take steps that included having

Kratochwill ask the campaign managers at the regular Monday morning campaign meeting at the ARC "how much money they need to finish their campaign plan, how much of that they can raise locally and how much they need the team to raise." Schultz was to tally pledges from campaign fundraising calls made by legislative leaders, and what could be expected in the future. Engels and Healy were to provide up-to-date tallies of money available from the Republican Party of Wisconsin, the RACC, the Republican Governor's Association, the Republican National State Elections Committee PAC, and local Republican parties. Jensen also asked these State employees for summaries of money available from an identified conduit and independent expenditure groups. Jensen wanted these tasks done as part of an overall effort "during next 10 days."

At Monday morning ARC meetings, Jensen was occasionally there to give the staffers a campaign "pep talk" Jensen made clear from certain references he made that he knew that the staffers would be leaving later that day to go back out to work on campaigns.

After the newspaper allegations in May 2001 that the ARC had been used extensively for campaign activity, Kratochwill and Jensen had a series of conversations on the topic. Jensen never suggested to Kratochwill that he did not understand or that he was surprised by the allegations. Jensen seemed more focused on trying to destroy the credibility of Lyndee Wall, the former ARC staffer who had spoken publicly about ARC campaign practices.

Statements of Brian Dake

Investigator Wysocki and S/A Strauss report that Brian Dake has made statements that include the following. Dake worked at the ARC from December of 1997 to January 2000 and in the Jensen Capitol office beginning in January 2000. The environment in the Capitol before the new work rules set up by the Ethics Board agreement in 2001 was that everybody was doing campaign work on state time. Neither Scott Jensen nor any staff members told Dake that he needed to use either vacation or comp time while campaigning. Dake worked with ARC graphic artists Lee Reidesel, Eric Grant, and Kacy Hack on campaign materials. Among campaign people, everybody knew that when one needed campaign graphics work done, one went to these three graphic artists.

Dake further said that Paul Tessmer, of the ARC, put together a master voter list for use in campaigns. These lists included columns reflecting which voters put yard signs in their yards, who donated money to campaigns, and what voting preference they had. ARC staff generally entered the voter data, and then overlaid that with public record information.

Statements of Carolyn Hughes

S/A Wilson reports that she participated in an interview with Carolyn Hughes, who stated in part the following. Hughes was employed as a Policy Analyst in the ARC from May or June 2000 to September 2001. Within one month of her starting at the ARC, Hughes was assigned by Jason Kratochwill to run a campaign race for an Assembly seat in northern Wisconsin. She went 30% off the payroll, leaving her as a 70% State employee, with the Republican Party of Wisconsin paying the remaining 30% of her salary. In August 2000, Hughes moved to the district where she was to work on the campaign full time. Hughes did virtually no legitimate state work after moving there. Hughes sometimes came back to the ARC office in Madison for Monday morning campaign meetings. If she needed voter list support, she contacted Paul Tessmer of the ARC. Sherry Schultz, located at the ARC, worked on political action committee and conduit contributions for the race. Kacy Hack of the ARC did graphics work for the campaign.

Hughes further said that on two different occasions she and others met with Jensen during the campaign season up in the district after she had moved to the district. One of these meetings, a lunch meeting, was to review progress on the campaign. During this meeting she discussed all the things that they was working on, such as literature drops, knocking on doors, and how fundraising was going. Hughes knows that Jensen was aware that she worked at the ARC. Hughes and others met with Jensen up in the campaign district for a dinner campaign meeting in October 2000. Jensen controlled this discussion.

Statements of William Cosh

S/A Wilson reports that she participated in an interview William Cosh, who said, in part, that while employed at the ARC he was the field coordinator for Northwest Wisconsin. In that capacity, Cosh supervised other campaign workers from various campaigns. In a meeting to discuss various campaigns prior to the 2000 election, Jensen joked that Cosh was to shadow the specific candidate at all times, even when the candidate went to the bathroom.

In August 2000, Cosh reduced his State employment by 30% although he spent the majority of his time doing campaign work and in fact lived in the district of a candidate he was assigned to. Jensen visited Cosh in the campaign district every other week and received updates on the campaign.

Statements of Lee Riedesel

S/A Freymiller reports that Lee Riedesel stated in part that in late October or early November of 2001 he attended a meeting of ARC employees, after it was known that the partisan caucuses were being shut down. At this meeting, Jensen stated words to the effect that ARC employees should not feel guilty because things have been this way for 35 years.

Statements of Tom Petri

S/A Freymiller reports that Tom Petri, formerly of the ARC, said in part in an interview that in December 2001, Petri attended a meeting at a bar in Madison. Foti, Jensen, and Ladwig were there, as were a number of ARC staffers. Jensen told those in attendance words to the effect of, "Don't think you guys did anything better or worse than other caucuses or people before you. You're just the ones who were here when the shit hit the fan." Jensen also said words to the effect of, "Your hard work won't be forgotten. You're not going to prison. You'll be taken care of."

Testimony of Steve Baas

Steve Baas has testified in 01 JD 06, and testified in part as follows. Since the *Wisconsin State Journal* printed its allegations starting in May 2001, Baas has heard Jensen say on more than one occasion that the activity alleged to be scandalous in the past year is activity similar, and in some ways more tame, than campaign activity that has been engaged in by State and local officials and staff over a long period of time.

Statements of Matthew Tompach

S/A Wilson reports that she participated in an interview with Matthew Tompach, during which Tompach made statements that include the following. In 2000, Tompach was named a regional director for campaign purposes at the ARC but left during the summer for a better job. Jensen called Tompach's new supervisor, a State official at a management level, and said that they were upset that Tompach left during the election cycle and that they needed his help.

Statements of Scott Jensen

On September 18, 2001, Jensen stated to your complainant, in part, the following. Jensen is the leader of the RACC. Jensen said he believed that his actions would have spoken clearly to state employees that all RACC business needs to be done off of state time. Jensen always believed that RACC should be separate from the ARC. When Jensen and RACC leaders meet, they use the conference room at the Republican Party offices. Monday morning meetings at the ARC during the 1998 or 2000 fall elections may have involved state business such as bill and

budget issues, so that state employees and/or legislative staff may have legitimately attended these meetings. Jensen said he is not aware of any of his staff using state equipment for pure campaign work. Jensen further said that he was not involved in any detailed discussions with the ARC Director regarding RACC assignments to campaign districts during election years. For example, Jensen said, he did not discuss in any detail who specifically should be sent to the field for campaigns, only whether races need more full or part-time staff.

FACTS AS TO COUNT FOUR (JENSEN): OFFICIAL CONDUCT RELATED TO THE OPERATION OF TAXPAYERS FOR JENSEN USING STATE EMPLOYEES AND RESOURCES

Complainant swears, reaffirms, and incorporates here by reference in connection with Count Four all facts related in this complaint in connection with the Background Facts, and Counts One, Three, and Five of this complaint. In addition, complainant further swears and affirms as follows.

Statements of Assistant Assembly Clerk Patrick Fuller

S/A Blackwood reports that she has been informed by Assistant Assembly Clerk Patrick Fuller that Carrie Hoeper Richard was employed in the Jensen's Capitol office from August 25, 1997 through October 7, 1999, leaving employment with a monthly salary of $2,898.

Statements of Carrie Hoeper Richard

S/A Freymiller reports that she participated in an interview with Carrie Hoeper Richard ("Richard"), who made statements that included the following. It was apparent to Richard from the first phone call that she received from Jensen Capitol office staffer Steve Baas regarding an open position in the Jensen Capitol office that Richard would be expected to do fundraising as part of her job. Fundraising was discussed in her interview with Jensen and Steve Baas at a Milwaukee brewery. At that time Jensen mentioned that he was thinking about running for Governor, and that he needed an organized fundraiser in order to do so.

Richard estimates that for the first six months of her employment in the Jensen Capitol office, she spent 50% of her time on Jensen campaign-related work. After the first six months Richard estimated that she spent approximately 80% of her time in the Jensen Capitol office doing Jensen campaign-related work.

Richard's first task when she started working in the Jensen Capitol office as a State employee was to work on a campaign fundraiser for Jensen. Richard performed this work in Jensen's Capitol office after Jensen staffer Jodie Tierney asked her to do this. For the first two weeks of her employment, Richard worked full-

time on the fundraiser. Tierney commented how happy other Jensen Capitol staffers were now that one person would be taking care of this fundraiser.

Richard never heard Jensen warn anyone in the Jensen Capitol office directly not to do campaign work on State property or during State time.

Richard worked with ARC graphic artists on Jensen campaign-related materials. This included literature for the "Speaker's Club," which was a fundraising effort created by Jensen and Richard. In addition, Richard occasionally met with Jensen in Jensen's Capitol office to discuss details of fundraising events and to report on her fundraising activities. Richard also became Jensen's campaign treasurer and began completing his campaign finance reports. As part of her duties as treasurer for Taxpayers for Jensen, Richard entered campaign contribution information on a database that she worked on in part in Jensen's Capitol office. Paul Tessmer, of the ARC, helped Richard with this database. Richard received some contribution checks at Jensen's Capitol office. Jensen brought in his campaign-related mail to the Capitol office from Jensen's home. Richard obtained the campaign contributions and entered the information on the database. Jensen also took Richard to lunch meetings where campaign contributions were received, because Jensen wanted donors to know that Richard was a person they should give contributions to.

Everyone in the Jensen Capitol office knew that Richard was working on campaign finance reports in that office. Richard complained to them about the amount of time it took her to work on the reports. Baas inquired about Richard's progress with the campaign finance reports.

At one point Baas told Richard that Baas had talked to Healy about having Richard do the campaign finance work elsewhere, such as at the Republican Party of Wisconsin, for one to two days a week. Healy said that having Richard work at the RPW would raise more red flags than if she were to simply continue doing the work in Jensen's office. Healy expressed the idea that if a reporter came to Jensen's office looking for Richard and did not find her there, it would validate the reporter's assumption that Richard was just a fundraiser for Jensen. Baas and Richard talked about the fact that Jensen's campaign paid to rent space from RPW, so it would make sense to use it.

All Jensen Capitol office staffers helped out with stuffing envelopes with fundraiser letters or thank you notes. Tierney and Baas recruited other Capitol staff members to assist, usually from the Foti Capitol office. Envelope stuffing sometimes took place during lunch hours or early evening, but not always. It was done in Jensen's own office, and Jensen was not present while it happened, but Jensen knew it took place because staff talked with him about it and let him know when they were finished. Staff of the Jensen Capitol office complained to Jensen that this envelope stuffing was not a good use of their time, so he agreed to start using mail houses for this function. Although Jensen did not participate directly in the envelope

stuffing, he liked to sign each letter or thank you that was mailed, sometimes while in his Capitol office, sometimes by the hundreds.

Baas always drafted fundraising letters for Jensen's campaign. Richard saw Baas do this in the Jensen Capitol office. Jensen reviewed at least half of the fundraising letters Baas wrote. Baas wrote the newsletter for Jensen's Speaker's Club, which was campaign material. It was distributed only to those who contributed at least $125 toward Jensen's campaign. Baas worked with ARC graphic artist Eric Grant regarding the design and layout of the newsletter. Richard accompanied Baas a few times during normal business hours when Baas would go to a recording studio to create audiotapes to be sent out to Speaker's Club members.

While employed by the Jensen Capitol office, Richard prepared fundraising call lists for Jensen, at Jensen's request or upon her own initiative when Jensen had not made calls for a while, and provided them to Jensen to make the fundraising calls. Jensen made these calls himself from his home and also from his Capitol office. On occasion, Jodi Tierney used the Jensen Capitol office calendar to schedule Jensen for this call time in half-hour increments. During the time in which lobbyists could contribute money to campaigns, Jensen called lobbyists, usually from his Capitol office.

When Jensen asked Richard in the Jensen Capitol office how planning of campaign events was going, Richard gave progress reports, including showing Jensen the host committee list before the list would be printed. Jensen suggested locations for events, and made lists of who would be good hosts. Richard also created lists of potential hosts based on lists of Jensen's campaign contributors, which Jensen would review. Jensen always reviewed his fundraising letters and his campaign finance reports. Most of the campaign-related conversations between Richard and Jensen took place while both of them were in Jensen's own office space within the Jensen Capitol office, or during staff meetings held in the Jensen Capitol office. Some also occurred on the telephone while Richard was in the Jensen Capitol office and Jensen was elsewhere.

Jensen knew that there was more work to be done than Richard could handle, so Jensen suggested names of others who could help Richard on campaign fundraising tasks.

By the time Richard left the Jensen Capitol office, Leigh Himebauch was working full time on database entry for the Taxpayers for Jensen finance reports.

Regarding the work that Paul Tessmer did on the campaign database, at one point Richard asked Jensen to thank Tessmer personally for his work on the database because she found the database so helpful.

Statements of Paul Tessmer

Inv. Wysocki reports that former ARC employee Paul Tessmer has made statements that include the following. When Brett Healy of the Jensen Capitol office asked Tessmer in early 1999 to try to create a campaign finance computer software program, Healy said that if Tessmer did not come up with something they would have to purchase something commercially for about $5,000. It was Tessmer's understanding that Healy wanted the campaign finance reporting program for use by Jensen. Healy made this request of Tessmer in the main office area of the Jensen Capitol office. Some legislators were then using a prior existing, but ineffective, campaign finance report software program created by Kathy Nickolaus of the ARC. Those legislators included Jensen and Ladwig.

Once Tessmer's program was operational, Carrie Richard of the Jensen Capitol office called Tessmer at the ARC office and Tessmer went to the Jensen Capitol office to help Richard with whatever problem Richard was having in entering data in the campaign finance report software for Jensen's campaign. Engels of Ladwig's Capitol office also called Tessmer for help when they encountered a problem with his report program. As a general matter, Tessmer extracted data already entered into the "Kathy Nickolaus software" and put it into his newer program.

The product of Tessmer's campaign finance report program can be printed out and delivered, e-mailed, or put on a disk for a final report to be filed with the State Elections Board. Tessmer's task was to take that data and input it to his program file to make sense of the data. Users of the software contacted Tessmer at the ARC to help them. Tessmer had to set up each user with an ID number and a password. It was important that Tessmer explain the system to them to avoid errors that would only cause them to need more help from Tessmer.

Tessmer said the program is a useful tool that was used extensively by staffers in Jensen's Capitol office. Richard and Jodi Tierney, also in Jensen's Capitol office, sought Tessmer's help with the finance program. Tessmer helped Tierney at the Jensen Capitol office and also at the RPW. Tessmer helped Tierney with the June 2000 campaign finance report.

Tessmer did not speak publicly, or to the Elections Board, about his campaign finance report program because he felt it was an advantage to Republicans to have exclusive use of the program. Tessmer and Schultz were invited by the Elections Board once to a meeting to share views on how electronic filing could be done. Tessmer and Schultz intentionally kept quiet in this meeting about their software to maintain their advantage using it.

Statements of Chad Taylor

S/A Freymiller reports that she participated in an interview with Chad Taylor, who made statements that included the following. Taylor worked in the Jensen

Capitol office from November 1997 to November 1999. Richard was treasurer for Taxpayers for Jensen when both Taylor and Richard worked in the Jensen Capitol office. Richard photocopied checks for campaign finance reports using the office copying machine. Taxpayers for Jensen campaign finance reports were sitting on copying machines and desks in the Jensen Capitol office.

Jensen told Taylor when Taylor started working in the Jensen Capitol office that it was illegal to do campaign work on State time or using State property.

Statements of Assistant Assembly Clerk Patrick Fuller

S/A Blackwood reports that she has been informed by Assistant Assembly Clerk Patrick Fuller that Leigh Himebauch was hired by the Jensen Capitol office effective September 8, 1998, and that she remained on his payroll until November 30, 1998. From May 1999 through November 2000, Himebauch was on the payroll of the Assembly Republican Caucus.

Statements of Leigh Himebauch

S/A Blackwood reports that she participated in an interview with Leigh Himebauch, and Himebauch also testified in 01 JD 06. These statements include the following. Himebauch was paid by the State as a limited term employee, working out of the Jensen Capitol office for the period October 1997 through May 2000. During the summers, she worked 40 hours per week and during the school year, she worked 20 hours per week. Himebauch was officially listed on the ARC payroll as a full-time employee during 2000, although she continued to work for Jensen. Brett Healy told Himebauch that, although Himebauch would be on the ARC payroll, there would really be no change in her duties in Jensen's office, which at that time were completely campaign-related.

Beginning in approximately 1998 until she left Jensen's office in November 2000, Himebauch's primary duties in Jensen's office involved campaign fundraising work for Taxpayers for Jensen. These duties, performed primarily in the Jensen Capitol office and utilizing State of Wisconsin resources, included copying checks, entering campaign contributions in a computer database, creating and maintaining financial records for Taxpayers for Jensen, and running reports or providing information to Jensen on campaign contributors. Himebauch worked with Carrie Richard on these duties. Himebauch received campaign contribution checks from various sources including picking them up from a post office box in Madison, receiving them from Richard, and receiving them directly from Jensen. Jensen brought campaign contribution checks into the Jensen Capitol office in a bag and left the checks for Himebauch or Richard. Himebauch also created lists of people for Jensen to call for campaign contributions. Jensen then left the office to make calls from the RPW. Himebauch's duties also included planning and scheduling of, and data management for, Jensen fundraisers including preparing invitations and thank-you letters.

Himebauch did increasing amounts of copying of campaign checks and the data entry related to them in the Jensen Capitol office and it was decided that she should move out of that office. Jodi Tierney, of the Jensen Capitol office, told Himebauch that she was going to move to the RPW. Tierney had mentioned that she was trying to get Himebauch paid by the Jensen Campaign, but it never amounted to anything. Tierney said words to the effect of, "I was always trying to push to get you paid by the campaign." But within a few days to a week after Tierney told Himebauch that there was a possibility that Himebauch could go on the Jensen Campaign payroll, Tierney told Himebauch that she would just be moving Himebauch to the RPW.

Everyone in the Jensen Capitol office knew that Himebauch was moving. Various staffers, most often Steve Baas, joked about how she would be lonely at the RPW. One day in May 2000, Himebauch moved her work materials from the Jensen Capitol office, including laptop and binders with Jensen Campaign Finance Reports, to the RPW. Tierney, who had keys to the RPW, helped her move. Once she had moved to the RPW, Himebauch would collect her monthly state paycheck from the Chief Clerk's office, or the ARC. At the RPW, Tierney showed Himebauch her office and introduced her around to other employees of the RPW.

Between May 2000 and November 2000, while she was located at the RPW and before she left state employment, Himebauch worked 100% of the time on Taxpayers for Jensen. While located at the RPW, Himebauch usually worked from 8:00 a.m. to 5:00 p.m., Monday through Friday and worked on her laptop computer. Himebauch would process checks, fill out deposits, get mail from the post office box used for the Jensen Campaign, and did this on a daily basis. Himebauch also pulled lists together from her database and would create mailings such as invitations or letters. Tierney sometimes helped with these projects. Himebauch kept a list of donors on her laptop and invitations were taken to a mail house for mailing. Tierney handled arranging the printers and the dates and times for completion of printing. The bulk of the thank-you letters Himebauch created she gave to Brett Healy, but she gave some directly to Jensen. Himebauch handled two fundraisers for Jensen while located at the RPW.

Sometimes Jensen came over to the RPW to make phone calls. Jensen used the office where Himebauch was located. Sometimes, while Jensen was at the RPW, he asked Himebauch for account balances. Jensen also asked Himebauch how things were going and they engaged in some talk about checks that were received. Typically, if there were questions, they came from Jensen through Tierney. On Fridays, Tierney usually had Himebauch run her a Taxpayers for Jensen balance so that Jensen could take it home with him to review.

If Tierney was not around, sometimes Brett Healy called Himebauch at the RPW to let her know that Jensen would be coming down to the office.

When Himebauch decided to leave state employment, she had an exit interview with Jensen and Healy in the Jensen Capitol office. Jensen told her that he was sorry to see her go. Jensen then asked Himebauch if she could work for him through the election and Himebauch told Jensen she would. During the time she was employed by Jensen, Jensen never told Himebauch what she could or could not do on state time as it pertained to campaigning.

Statements of Amy Fuelleman

Amy Fuelleman, a Wisconsin Department of Justice paralegal, states that she reviewed Taxpayers for Jensen campaign finance reports for 1998-2002 kept and maintained by the State Elections Board in the usual course of business. These records state that Himebauch was paid $170.53 and no more.

Statements of Jason Kratochwill

S/A Strauss reports that Jason Kratochwill said, in part, that Richard told Kratochwill that she was doing fundraising in Jensen's Capitol office. Kratochwill observed fundraising databases on her laptop in Jensen's Capitol office.

Kratochwill further said that Paul Tessmer gave Kratochwill a memo Tessmer had prepared regarding a fundraising database Tessmer had created for Jensen, analyzing campaign contributors to Taxpayers for Jensen. Tessmer also told Kratochwill when Tessmer was going over to the Jensen Capitol office. Based on Tessmer's duties, the only reason Tessmer went to Jensen's office was to work on the fundraising database program.

Leigh Himebauch was on the payroll of the ARC, but worked exclusively in the Jensen Capitol office. In addition, two others were officially listed as ARC staffers but, in fact, worked in the Jensen Capitol office. Kratochwill and Healy talked about moving Himebauch to the ARC to work as an executive assistant during the 2000 campaign, but it did not come to pass.

Testimony of Kacy Hack

Complainant is aware that Kacy Hack has testified in 01 JD 06. Hack testified that in part that she was employed at the ARC as a graphic artist beginning in April 1999 for the next 2 1/2 years. Hack stated that she worked on various campaign fundraising invitations for Sherry Schultz. This included 3-4 fundraisers for Taxpayers for Jensen done at Schultz's request.

Statements of Charlene Rodriguez

S/A Blackwood reports that she participated in an interview with Charlene Rodriguez, who stated in part the following. Sometime after Rodriguez started working in the Foti Capitol office in March 1999, Jodie Tierney of Jensen's Capitol

office started working out of an annex area of the Capitol also used by Sherry Schultz. This Capitol annex office was used for political campaign mailings during the time that both Schultz and Tierney were working out of it. At one point Tierney stopped by the Foti Capitol office and asked for help in the annex. Rodriguez then helped Tierney with a political campaign mailing for Jensen.

Testimony of Steve Baas

Steve Baas has testified in 01 JD 06, in part as follows. When Carrie Richard and Jodi Tierney were each acting as treasurers for Taxpayers for Jensen, each gave Baas in the Jensen Capitol office fundraising documents to review and edit. These included direct mail solicitations and thank you letters. Some of these were major rewrites of a fundraising draft. Baas prepared some of these items on his State computer and printed them out on State printers.

Baas further testified that Jensen appreciated the quality of the work done by the ARC graphic artists and was complimentary of their skills. Jensen knew that the graphic artists were creating his Speaker's Club campaign mailings.

FACTS AS TO COUNT FIVE (JENSEN, LADWIG): INTENTIONAL MISUSE OF PUBLIC POSITIONS FOR PRIVATE BENEFIT OF RACC

Complainant swears, reaffirms, and incorporates here by reference in connection with Count Five all facts related in this complaint in connection with the Background Facts, and Counts One, Three, and Four of this complaint. In addition, complainant further swears and affirms as follows.

Statements of Virginia Mueller Keleher

S/A Blackwood states that she participated in an interview of Virginia Mueller Keleher who stated in part that she was employed by a Wisconsin State Representative from August 1994 to December 2000. During 1995 and 1996, Keleher performed RACC duties while being paid as a full-time State employee. Keleher's office was located at the ARC starting in June 1996, and beginning at that time, Keleher performed solely RACC activities and did no legitimate State work. Ray Carey, who had the office next to hers at the ARC, came to Keleher's office to ask for specific RACC numbers, how much money there was, and RACC reports. Part of Keleher's duties in regards to RACC was to collect assessment checks from every Republican representative. In performing her duties for RACC, Keleher had contact with Scott Jensen at least once a week to update him on RACC money received. Jensen sent staff, including Brett Healy, to her for this information. Sometimes Healy called to check numbers in the RACC checkbook. It was not unusual for Jensen to visit the ARC to directly obtain RACC information. Jensen asked questions such as, "Did you get this check?" or "Did you pay this?"

After Ladwig won a leadership position in November 1996, Keleher met with Ladwig. Keleher showed Ladwig the RACC checkbook. Ladwig told Keleher that Jensen wanted to hire Greg Reiman.

In February 1997, Keleher handed her RACC materials to Ladwig and eventually Reiman. The RACC banking supplies, notes, and finance reports were left at the ARC.

Statements of Greg Reiman

S/A Blackwood and S/A Strauss participated in interviews with Greg Reiman. S/As Blackwood and Strauss report that Reiman made statements that included the following. Reiman was employed by the Jensen Capitol office from September 1996 to January 1997 as an LTE. Reiman knew Jensen from campaign work they both did in 1988 and 1990. Reiman also volunteered to work for Jensen as a candidate, both before and after Jensen hired Reiman to work as a limited term employee in the Jensen Capitol office.

In January 1997, Reiman began to work in the Ladwig Capitol office and continued to do so until the end of 1998. Jensen recommended Reiman for the job in Ladwig's Capitol office. Ladwig had just become Assistant Majority Leader. Ladwig told Reiman that his duties would include fundraising related work for RACC. Reiman had previously organized fundraisers for Jensen, and Jensen thought that the job with Ladwig would be appropriate based on Reiman's fundraising background for Jensen and other candidates.

When Reiman interviewed with Ladwig to work in her Capitol office, Reiman told Ladwig that he could assist her with RACC duties. Immediately upon beginning his job in Ladwig's Capitol office, Reiman began helping Ladwig with RACC. Ladwig instructed Reiman to obtain the RACC records from Virginia Mueller Keleher, who worked in another Representative's office, and Reiman did so. The RACC records had been stored at the ARC. Reiman organized the RACC records and entered a lot of the information onto a RACC laptop computer. RACC materials that Reiman needed on a frequent basis he kept in Ladwig's office while the remaining records were stored at the ARC. The RACC-related duties Reiman performed in Ladwig's Capitol office while an employee of that office included: picking up RACC mail; copying contribution checks and entering them in a computer database; depositing RACC checks; maintaining a ledger of RACC bills; preparing RACC checks for Ladwig to sign; preparing RACC campaign finance reports; planning and organizing RACC fundraisers; scheduling meetings between lobbyists and Jensen, Foti and Ladwig to solicit campaign contributions for RACC and keeping track of these contributions; and drafting RACC budgets. The RACC budget included amounts to be used to pay State employees for campaign work. Ladwig was a micro-manager regarding RACC and knew the work Reiman was performing.

Reiman occasionally attended RACC meetings, usually held monthly in Jensen's office, with persons who included Jensen, Ladwig, and Foti. The typical meeting involved discussions of RACC fundraising goals and expenditures, including a discussion of the RACC budgets Reiman had prepared, and discussion of vulnerable candidates.

Toward the end of 1998, while Reiman was working in the Ladwig Capitol office, Ladwig told Reiman that Assembly Republican leadership wanted Reiman to help with a special project, namely to track, over the course of an entire election cycle, all special interest contributions to every candidate. Ladwig sent Reiman to Jensen to get further instructions. Ladwig indicated that Reiman would be doing a big favor for Jensen in working on the special project.

Reiman then went to Jensen's Capitol office. Jensen told Reiman that it might be better for Reiman to get out of Ladwig's Capitol office, and that Jensen would help find Reiman a job in the Capitol after the special project was over. Jensen explained the special project. Reiman was to create a thorough analysis of special interest money going into all Assembly races, creating a comprehensive money trail for the entire election cycle for the entire Assembly. Reiman felt that Jensen was helping Reiman out by finding work for him until the 1998 elections were over and Reiman could then find another legislator's office to work in. Jensen told Reiman to go to the ARC and talk to ARC Director Ray Carey, who would help Reiman find a space to work on the special project.

At the ARC, Reiman shared a cubicle with an ARC staffer. The cubicle was located next to Sherry Schultz. Reiman's work on the special project for leadership lasted from August to December 1998. Reiman had to go to the State Elections Board and review each candidate's campaign finance report. Reiman documented the necessary information from the campaign finance reports on yellow legal pads, then returned to his cubicle at the ARC and entered this information into an Access software database. Paul Tessmer of the ARC helped show Reiman how the database worked, which allowed Reiman to create reports.

Reiman prepared three separate reports for the special project. The first included three campaign finance reports filed between January 1997 and June 1998. The second report included the three previously mentioned campaign finance reports and the pre-primary campaign finance reports, which were filed after June 30, 1998. The final report included the three campaign finance reports filed between January 1997 through June 1998, the pre-primary report and the pre-election campaign finance reports. When Reiman completed each report, he made three copies: one for Jensen, the second for Ladwig, and the third maintained by Reiman. The copy Reiman kept was reviewed by Sherry Schultz. Reiman discussed the reports with Schultz.

Ray Carey knew Reiman was in the ARC and that Reiman was there to do a special project for leadership. But Carey did not supervise Reiman during this special project. Instead, Ladwig and Jensen supervised Reiman.

Statements of Patrick Fuller

S/A Blackwood reports that Assistant Assembly Chief Clerk Pat Fuller has provided information to her from regularly kept business records of the state reflecting that Greg Reiman's state employment history includes the following:

Employer	Dates	Status	Pay Per Month
Jensen Capitol Office	9/16/96 – 11/5/96	70% LTE	$2,075.50
Jensen Capitol Office	12/9/96 – 1/3/97	100% LTE	$2,965.00
Ladwig Capitol Office	1/6/97 – 8/1/98	Leg. Ass't.	$3,464.00
Jensen Capitol Office	8/2/98 - 12/28/98	Admin. Ass't.	$3,464.00
Other Legislative Office	12/29/98 – 4/25/99	Research Ass't.	$3,464.00

Statements of Judith Rhodes Engels

S/A Strauss reports that she participated in interviews with Judith Rhodes Engels, who stated in part she worked in the Ladwig Capitol office from November 1996 until Spring 2001 as a legislative assistant. Ladwig hired Reiman in approximately January 1997. Reiman's duties included RACC fundraising, including organizing fundraisers and preparing RACC campaign finance reports, which Engels observed being discussed with Ladwig. Engels also observed Reiman obtaining RACC fundraising materials from the ARC and reviewing the materials with Ladwig. Engels assisted Reiman with some of his RACC duties while Reiman was employed in the Ladwig Capitol office. When Reiman left Ladwig's Capitol office, Ladwig asked Engels to take over Reiman's position and duties.

During her employment with Ladwig, Engels was paid entirely by the State, was never paid by RACC or the Republican Party, and never went off payroll to perform any RACC work. During campaign season and when RACC finance reports were due, Engels spent about 75% of her State work time on RACC work. RACC records were kept at Ladwig's office and the ARC. Engels discussed her RACC work with Ladwig. The only rule Engels was aware of regarding RACC work was that she was not to e-mail fundraising invitation information to the ARC graphic artist.

The goal of RACC was to raise campaign money. One way in which money was prioritized was to "assess" each Republican member a certain amount of money

for the "team," payable either to RACC or directly to a candidate. Decisions on these matters were made by Jensen and Ladwig. Part of Engles' duties for RACC included keeping track of such assessments, while Sherry Schultz was to keep track of where the assessment money went for different campaigns. On some occasions Engels or Ladwig would receive contributions for an individual campaign and they gave these checks to Schultz for delivery to the respective campaign. Engels also kept records regarding RACC expenditures and discussed RACC bills with Jensen. Jensen decided who should pay the bills.

Engels was responsible for RACC work, but Jason Kratochwill prepared the RACC budget, which was discussed at RACC meetings with Ladwig and Jensen. Engels also attended other meetings with Jensen, Foti and Ladwig, which Engels described as "Big 3" meetings or leadership meetings. At these meetings, campaign plans and campaign finances, including RACC finances, were discussed. Engel's job at such meetings was to report on RACC finances while Schultz reported on the finances of individual campaigns. Kratochwill would also report on which candidates needed money. Jensen decided which candidates were going to get what money and then directed Ladwig to obtain the money from the assessments. In addition, various legislators known as the phone crew, including Jensen, Foti and Ladwig, were assigned to make fundraising calls to lobbyists. Schultz was responsible for keeping track of the money raised and would receive the checks and report back on the results at meetings.

Engels was familiar with Greg Reiman's special project from 1998. Jensen and Ladwig used the results of the project for meetings with lobbyists to request contributions for RACC.

Statements of Rhonda Drachenberg

S/A Freymiller reports that she participated in an interview with Rhonda Drachenberg, who said in part the following. While working at the ARC, Drachenberg reported to the ARC Director on her RACC duties, but she also had contact with Ladwig. Those duties included creating RACC organizational charts.

Ladwig was in charge of RACC funds and was very money conscious. Ladwig became upset when packages sent to candidates resulted in costly UPS bills. Ladwig called Drachenberg several times and told her to "lay off" the UPS mailings. Drachenberg would pass along Ladwig's requests to the ARC Director. When Drachenberg planned a RACC event, obtaining price quotes for food, Ladwig would call Drachenberg and complain that the quotes were too high and that Drachenberg had not found the best price. Drachenberg would go to Greg Reiman in the Ladwig Capitol office when she needed RACC stamps.

In her RACC work, Drachenberg interacted regularly with Engels, a Ladwig Capitol office staffer. In this connection, Drachenberg sometimes met with Engels in the Ladwig Capitol office.

Statements of Carrie Hoeper Richard

S/A Freymiller reports that Carrie Hoeper Richard said, in part, that during the 1998 election cycle Jensen had Richard schedule a daylong series of meetings for himself and Bonnie Ladwig with lobbyists at the RPW offices in Madison. Richard acted as receptionist and attended some of the meetings, which were scheduled every 15-30 minutes. During those meetings Jensen and Ladwig asked the lobbyists to contribute to various candidates. Richard received checks generated as a result of the meetings and then delivered them to the appropriate candidates.

**THIS COMPLAINT IS BASED ON the information and belief of your complainant, who is a Director of the White Collar Crimes Bureau for the Wisconsin Department of Justice's Division of Criminal Investigation, and who learned of the above offenses from his own observations and the reports of Wisconsin Department of Justice's Division of Criminal Investigation S/A(s) Dorinda Freymiller, Amy Blackwood, Deb Strauss, Lisa Wilson, and Dane County District Attorney's Investigator Mark Wysocki, which report(s) your complainant believes to be reliable inasmuch as they were prepared during the course of the officer(s) official duties.

Further, your complainant believes the information furnished by Amy Fuelleman, John Scocos, Linda Hanson, Carrie Hoeper Richard, Ray Carey, Jason Kratochwill, Stacy Ascher-Knowlton, Charlene Rodriguez, Rhonda Drachenberg, Michelle Arbiture, Michael Heifetz, Rose Smyrski, Lee Riedesel, Eric Grant, Kacy Hack, Lyndee Wall, Judith Rhodes Engels, Scott Jensen, Garey Bies, Amy Petrowski, Matthew Tompach, Carolyn Hughes, Brian Dake, William Cosh, Paul Tessmer, Tom Petri, Steve Baas, Brett Healy, Roger Cliff, Patrick Essie, James Buchen, Richard Graber, Patrick Fuller, Chad Taylor, Leigh Himebauch, Virginia Mueller Keleher, and Greg Reiman to be reliable inasmuch as they witnessed the events described.

David L. Collins
DCI Director David Collins

Subscribed and sworn to before me this
18th day of October, 2002

K. L. Kell
Notary Public, Dane County
My commission is permanent

CHAPTER 11

CAMPAIGN FINANCING

Cross–reference: See definitions in s. 5.02.
Cross Reference: See also chs. ElBd 1 and 6, Wis. adm. code.

11.001 Declaration of policy. (1) The legislature finds and declares that our democratic system of government can be maintained only if the electorate is informed. It further finds that excessive spending on campaigns for public office jeopardizes the integrity of elections. It is desirable to encourage the broadest possible participation in financing campaigns by all citizens of the state, and to enable candidates to have an equal opportunity to present their programs to the voters. One of the most important sources of information to the voters is available through the campaign finance reporting system. Campaign reports provide information which aids the public in fully understanding the public positions taken by a candidate or political organization. When the true source of support or extent of support is not fully disclosed, or when a candidate becomes overly dependent upon large private contributors, the democratic process is subjected to a potential corrupting influence. The legislature therefore finds that the state has a compelling interest in designing a system for fully disclosing contributions and disbursements made on behalf of every candidate for public office, and in placing reasonable limitations on such activities. Such a system must make readily available to the voters complete information as to who is supporting or opposing which candidate or cause and to what extent, whether directly or indirectly. This chapter is intended to serve the public purpose of stimulating vigorous campaigns on a fair and equal basis and to provide for a better informed electorate.

(2) This chapter is also intended to ensure fair and impartial elections by precluding officeholders from utilizing the perquisites of office at public expense in order to gain an advantage over nonincumbent candidates who have no perquisites available to them.

(2m) The legislature finds a compelling justification for minimal disclosure of all communications that are to be made near the time of an election and that include a reference to or depiction of a clearly identified candidate at that election in order to permit increased funding for candidates who are affected by those communications. This minimal disclosure burden is outweighed by the need to establish an effective funding mechanism for affected candidates to effectively respond to communications that may impact an election.

NOTE: Sub. (2m) is created eff. 7–1–03 by 2001 Wis. Act 109.

(3) This chapter is declared to be enacted pursuant to the power of the state to protect the integrity of the elective process and to assure the maintenance of free government.

History: 1973 c. 334; 1979 c. 328; 1985 a. 303; 2001 a. 109.
Campaign finance in Wisconsin after *Buckley*. 1976 WLR 816.

11.002 Construction. This chapter shall be construed to impose the least possible restraint on persons or organizations whose activities do not directly affect the elective process, consistent with the right of the public to have a full, complete and readily understandable accounting of those activities intended to influence elections.

History: 1979 c. 328 ss. 9, 11.

11.01 Definitions. As used in this chapter:

(1) "Candidate" means every person for whom it is contemplated or desired that votes be cast at any election held within this state, other than an election for national office, whether or not the person is elected or nominated, and who either tacitly or expressly consents to be so considered. A person does not cease to be a candidate for purposes of compliance with this chapter or ch. 12 after the date of an election and no person is released from any requirement or liability otherwise imposed under this chapter or ch. 12 by virtue of the passing of the date of an election.

(2) "Charitable organization" means any organization described in section 170 (c) (2) of the internal revenue code, and also includes the United States, any state, territory or possession, the District of Columbia and any political subdivision thereof, when a gift is made exclusively for public purposes; but does not include any private organization conducting activities for political purposes.

(3) "Clearly identified", when used with reference to a communication in support of or in opposition to a candidate, means:

(a) The candidate's name appears;

(b) A photograph or drawing of the candidate appears; or

ing such advertising may pay any rate or charge in excess of the regularly charged rate.

History: 1973 c. 334.

11.33 Use of government materials by candidates. (1) (a) No person elected to state or local office who becomes a candidate for national, state or local office may use public funds for the cost of materials or distribution for 50 or more pieces of substantially identical material distributed after:

1. In the case of a candidate who is nominated by nomination papers, the first day authorized by law for circulation of nomination papers as a candidate.

2. In the case of a candidate who is nominated at a primary election by write-in votes, the day the board of canvassers issues its determination that the person is nominated.

3. In the case of a candidate who is nominated at a caucus, the date of the caucus.

4. In the case of any other candidate who is nominated solely by filing a declaration of candidacy, the first day of the month preceding the month which includes the last day for filing the declaration.

(b) This subsection applies until after the date of the election or after the date of the primary election if the person appears as a candidate on a primary election ballot and is not nominated at the primary election.

(2) This section does not apply to use of public funds for the costs of the following, when not done for a political purpose:

(a) Answers to communications of constituents.

(c) Actions taken by a state or local government administrative officer pursuant to a specific law, ordinance or resolution which authorizes or directs the actions to be taken.

(d) Communications not exceeding 500 pieces by members of the legislature relating solely to the subject matter of a special session or extraordinary session, made during the period between the date that the session is called or scheduled and 14 days after adjournment of the session.

(3) Except as provided in sub. (2), it is not a defense to a violation of sub. (1) that a person was not acting with a political purpose. This subsection applies irrespective of the distributor's intentions as to political office, the content of the materials, the manner of distribution, the pattern and frequency of distribution and the value of the distributed materials.

History: 1973 c. 334; 1975 c. 369; 1979 c. 328; 1983 a. 27; 1985 a. 303, 332; 1987 a. 370.

This section applies to persons elected to state office who are seeking reelection or election to a different office and to the use of public funds for political purposes. 69 Atty. Gen. 259.

11.34 Solicitation of contributions from candidates restricted. (1) No person may demand, solicit, take, invite or receive from a candidate any gift of anything of value for a religious, charitable or fraternal cause or for any organization other than a political committee or group. No candidate may make, intimate or promise such a gift.

(2) This section does not apply to payment of a regular subscription or contribution by a person to an organization of which the person is a member or to which the person may have been a regular contributor prior to the person's candidacy or to ordinary contributions at a regular church service.

History: 1973 c. 334; 1985 a. 303; 1991 a. 316; 1993 a. 213.

11.36 Political solicitation involving public officials and employees restricted. (1) No person may solicit or receive from any state officer or employee or from any officer or employee of the University of Wisconsin Hospitals and Clinics Authority any contribution or service for any political purpose while the officer or employee is engaged in his or her official duties, except that an elected state official may solicit and receive services not constituting a contribution from a state officer or employee or an officer or employee of the University of Wisconsin Hospitals and Clinics Authority with respect to a referendum only. Agreement to perform services authorized under this subsection may not be a condition of employment for any such officer or employee.

(2) No person may solicit or receive from any officer or employee of a political subdivision of this state any contribution or service for any political purpose during established hours of employment or while the officer or employee is engaged in his or her official duties.

(3) Every person who has charge or control in a building, office or room occupied for any purpose by this state, by any political subdivision thereof or by the University of Wisconsin Hospitals and Clinics Authority shall prohibit the entry of any person into that building, office or room for the purpose of making or receiving a contribution.

(4) No person may enter or remain in any building, office or room occupied for any purpose by the state, by any political subdivision thereof or by the University of Wisconsin Hospitals and Clinics Authority or send or direct a letter or other notice thereto for the purpose of requesting or collecting a contribution.

(5) In this section, "political purpose" includes an act done for the purpose of influencing the election or nomination for election of a person to national office, and "contribution" includes an act done for that purpose.

(6) This section does not apply to response by a legal custodian or subordinate of the custodian to a request to locate, reproduce or inspect a record under s. 19.35, if the request is processed in the same manner as the custodian or subordinate responds to other requests to locate, reproduce or inspect a record under s. 19.35.

History: 1973 c. 334; 1979 c. 328, 355; 1985 a. 303; 1987 a. 370; 1995 a. 27.

11.37 Travel by public officers. (1) No person may use any vehicle or aircraft owned by the state or by any local governmental unit for any trip which is exclusively for the purposes of campaigning in support of or in opposition to any candidate for national, state or local office, unless use of the vehicle or aircraft is required for purposes of security protection provided by the state or local governmental unit.

(2) No person may use any vehicle or aircraft owned by the state or by any local governmental unit for purposes which include campaigning in support of or in opposition to any candidate for national, state or local office, unless the person pays to the state or local governmental unit a fee which is comparable to the commercial market rate for the use of a similar vehicle or aircraft and for any services provided by the state or local governmental unit to operate the vehicle or aircraft. If a trip is made in part for a public purpose and in part for the purpose of campaigning, the person shall pay for the portion of the trip attributable to campaigning, but in no case less than 50% of the cost of the trip. The portion of the trip attributable to campaigning shall be determined by dividing the number of appearances made for campaign purposes by the total number of appearances. Fees payable to the state shall be prescribed by the secretary of administration and shall be deposited in the account under s. 20.855 (6) (h). Fees payable to a local governmental unit shall be prescribed by the governing body of the governmental unit.

History: 1973 c. 334; 1979 c. 221, 328, 355; 1983 a. 27 s. 2202 (57); 1985 a. 303.

11.38 Contributions and disbursements by corporations and cooperatives. (1) (a) 1. No foreign or domestic corporation, or association organized under ch. 185, may make any contribution or disbursement, directly or indirectly, either independently or through any political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum.

2. Notwithstanding subd. 1., any such corporation or association may establish and administer a separate segregated fund and solicit contributions from individuals to the fund to be utilized by such corporation or association, for the purpose of supporting or opposing any candidate for state or local office but the corporation

ing such advertising may pay any rate or charge in excess of the regularly charged rate.

History: 1973 c. 334.

11.33 Use of government materials by candidates. (1) (a) No person elected to state or local office who becomes a candidate for national, state or local office may use public funds for the cost of materials or distribution for 50 or more pieces of substantially identical material distributed after:

1. In the case of a candidate who is nominated by nomination papers, the first day authorized by law for circulation of nomination papers as a candidate.

2. In the case of a candidate who is nominated at a primary election by write-in votes, the day the board of canvassers issues its determination that the person is nominated.

3. In the case of a candidate who is nominated at a caucus, the date of the caucus.

4. In the case of any other candidate who is nominated solely by filing a declaration of candidacy, the first day of the month preceding the month which includes the last day for filing the declaration.

(b) This subsection applies until after the date of the election or after the date of the primary election if the person appears as a candidate on a primary election ballot and is not nominated at the primary election.

(2) This section does not apply to use of public funds for the costs of the following, when not done for a political purpose:

(a) Answers to communications of constituents.

(c) Actions taken by a state or local government administrative officer pursuant to a specific law, ordinance or resolution which authorizes or directs the actions to be taken.

(d) Communications not exceeding 500 pieces by members of the legislature relating solely to the subject matter of a special session or extraordinary session, made during the period between the date that the session is called or scheduled and 14 days after adjournment of the session.

(3) Except as provided in sub. (2), it is not a defense to a violation of sub. (1) that a person was not acting with a political purpose. This subsection applies irrespective of the distributor's intentions as to political office, the content of the materials, the manner of distribution, the pattern and frequency of distribution and the value of the distributed materials.

History: 1973 c. 334; 1975 c. 369; 1979 c. 328; 1983 a. 27; 1985 a. 303, 332; 1987 a. 370.

This section applies to persons elected to state office who are seeking reelection or election to a different office and to the use of public funds for political purposes. 69 Atty. Gen. 259.

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(2) This section does not apply to payment of a regular subscription or contribution by a person to an organization of which the person is a member or to which the person may have been a regular contributor prior to the person's candidacy or to ordinary contributions at a regular church service.

History: 1973 c. 334; 1985 a. 303; 1991 a. 316; 1993 a. 213.

11.36 Political solicitation involving public officials and employees restricted. (1) No person may solicit or receive from any state officer or employee or from any officer or employee of the University of Wisconsin Hospitals and Clinics Authority any contribution or service for any political purpose while the officer or employee is engaged in his or her official duties, except that an elected state official may solicit and receive services not constituting a contribution from a state officer or employee or an officer or employee of the University of Wisconsin Hospitals and Clinics Authority with respect to a referendum only. Agreement to perform services authorized under this subsection may not be a condition of employment for any such officer or employee.

(2) No person may solicit or receive from any officer or employee of a political subdivision of this state any contribution or service for any political purpose during established hours of employment or while the officer or employee is engaged in his or her official duties.

(3) Every person who has charge or control in a building, office or room occupied for any purpose by this state, by any political subdivision thereof or by the University of Wisconsin Hospitals and Clinics Authority shall prohibit the entry of any person into that building, office or room for the purpose of making or receiving a contribution.

(4) No person may enter or remain in any building, office or room occupied for any purpose by the state, by any political subdivision thereof or by the University of Wisconsin Hospitals and Clinics Authority or send or direct a letter or other notice thereto for the purpose of requesting or collecting a contribution.

(5) In this section, "political purpose" includes an act done for the purpose of influencing the election or nomination for election of a person to national office, and "contribution" includes an act done for that purpose.

(6) This section does not apply to response by a legal custodian or subordinate of the custodian to a request to locate, reproduce or inspect a record under s. 19.35, if the request is processed in the same manner as the custodian or subordinate responds to other requests to locate, reproduce or inspect a record under s. 19.35.

History: 1973 c. 334; 1979 c. 328, 355; 1985 a. 303; 1987 a. 370; 1995 a. 27.

11.37 Travel by public officers. (1) No person may use any vehicle or aircraft owned by the state or by any local governmental unit for any trip which is exclusively for the purposes of campaigning in support of or in opposition to any candidate for national, state or local office, unless use of the vehicle or aircraft is required for purposes of security protection provided by the state or local governmental unit.

(2) No person may use any vehicle or aircraft owned by the state or by any local governmental unit for purposes which include campaigning in support of or in opposition to any candidate for national, state or local office, unless the person pays to the state or local governmental unit a fee which is comparable to the commercial market rate for the use of a similar vehicle or aircraft and for any services provided by the state or local governmental unit to operate the vehicle or aircraft. If a trip is made in part for a public purpose and in part for the purpose of campaigning, the person shall pay for the portion of the trip attributable to campaigning, but in no case less than 50% of the cost of the trip. The portion of the trip attributable to campaigning shall be determined by dividing the number of appearances made for campaign purposes by the total number of appearances. Fees payable to the state shall be prescribed by the secretary of administration and shall be deposited in the account under s. 20.855 (6) (h). Fees payable to a local governmental unit shall be prescribed by the governing body of the governmental unit.

History: 1973 c. 334; 1979 c. 221, 328, 355; 1983 a. 27 a. 2202 (57); 1985 a. 303.

11.38 Contributions and disbursements by corporations and cooperatives. (1) (a) 1. No foreign or domestic corporation, or association organized under ch. 185, may make any contribution or disbursement, directly or indirectly, either independently or through any political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum.

2. Notwithstanding subd. 1., any such corporation or association may establish and administer a separate segregated fund and solicit contributions from individuals to the fund to be utilized by such corporation or association, for the purpose of supporting or opposing any candidate for state or local office but the corporation

CHAPTER 12

PROHIBITED ELECTION PRACTICES

Cross-reference: See definitions in s. 5.02.

12.01 Definitions. The definitions given under s. 11.01 apply to this chapter, except that a "candidate" includes candidates for national office.

History: 1973 c. 334; 1975 c. 93; 1977 c. 427; 1979 c. 89; 1983 a. 484.

12.02 Construction. In this chapter, criminal intent shall be construed in accordance with s. 939.23.

History: 1977 c. 427.

12.03 Election day campaigning restricted. **(1)** No election official may engage in electioneering on election day.

(2) No person may engage in electioneering during polling hours on any public property on election day within 100 feet of an entrance to a building containing a polling place. This subsection does not apply to the placement of any material on the bumper of a motor vehicle that is located on such property on election day.

(3) A municipal clerk, election inspector or law enforcement officer may remove posters or other advertising which is placed in violation of this section.

(4) In this section, "electioneering" means any activity which is intended to influence voting at an election.

History: 1973 c. 334; 1977 c. 427; 1979 c. 89; 1983 a. 484; 1993 a. 173.

Violators may not be deprived of the right to vote, although penalties may follow. Constitutional issues are discussed. 61 Atty. Gen. 441.

12.04 Communication of political messages. **(1)** In this section:

(a) "Election campaign period" means:

1. In the case of an election for office, the period beginning on the first day for circulation of nomination papers by candidates, or the first day on which candidates would circulate nomination papers were papers to be required, and ending on the day of the election.

2. In the case of a referendum, the period beginning on the day on which the question to be voted upon is submitted to the electorate and ending on the day on which the referendum is held.

(b) "Political message" means a message intended for a political purpose or a message which pertains to an issue of public policy of possible concern to the electorate, but does not include a message intended solely for a commercial purpose.

(c) "Residential property" means property occupied or suitable to be occupied for residential purposes and property abutting that property for which the owner or renter is responsible for the maintenance or care. If property is utilized for both residential and nonresidential purposes, "residential property" means only the portion of the property occupied or suitable to be occupied for residential purposes.

(2) Except as provided in s. 12.03 or as restricted under sub. (4), any individual may place a sign containing a political message upon residential property owned or occupied by that individual during an election campaign period.

(3) Except as provided in sub. (4), no county or municipality may regulate the size, shape, placement or content of any sign containing a political message placed upon residential property during an election campaign period.

(4) (a) A county or municipality may regulate the size, shape or placement of any sign if such regulation is necessary to ensure traffic or pedestrian safety. A county or municipality may regulate the size, shape or placement of any sign having an electrical, mechanical or audio auxiliary.

(b) In addition to regulation under par. (a), a 1st, 2nd or 3rd class city, or a town, may regulate the size, shape or placement of a sign exceeding 11 square feet in area. This paragraph does not apply to a sign which is affixed to a permanent structure and does not extend beyond the perimeter of the structure, if the sign does not obstruct a window, door, fire escape, ventilation shaft or other area which is required by an applicable building code to remain unobstructed.

(5) (a) The renter of residential property may exercise the same right as the owner to place a sign upon the property under sub. (2) in any area of the property occupied exclusively by the renter. The terms of a lease or other agreement under which residential property is occupied shall control in determining whether property is occupied exclusively by a renter.

(b) The owner of residential property may exercise the right granted under sub. (2) in any portion of the property not occupied exclusively by a renter.

(6) This section does not apply to signs prohibited from being erected under s. 84.30.

History: 1985 a. 198; 1993 a. 246.

12.05 False representations affecting elections. No person may knowingly make or publish, or cause to be made or published, a false representation pertaining to a candidate or referendum which is intended or tends to affect voting at an election.

History: 1973 c. 334; 1993 a. 175.

A violation of this section does not constitute defamation per se. Tatur v. Solsrud, 174 Wis. 2d 735, 498 N.W.2d 232 (1993).

12.07 Election restrictions on employers. **(1)** No person may refuse an employee the privilege of time off for voting under s. 6.76 or subject an employee to a penalty therefor.

(2) No employer may refuse to allow an employee to serve as an election official or make any threats or offer any inducements of any kind to the employee for the purpose of preventing the employee from so serving.

(3) No employer or agent of an employer may distribute to any employee printed matter containing any threat, notice or information that if a particular ticket of a political party or organization or candidate is elected or any referendum question is adopted or rejected, work in the employer's place or establishment will cease, in whole or in part, or the place or establishment will be closed, or the salaries or wages of the employees will be reduced, or other threats intended to influence the political opinions or actions of the employees.

(4) No person may, directly or indirectly, cause any person to make a contribution or provide any service or other thing of value to or for the benefit of a candidate, political party or registrant un-

der s. 11.05, with the purpose of influencing the election or nomination of a candidate to national, state or local office or the passage or defeat of a referendum by means of the denial or the threat of denial of any employment, position, work or promotion, or any compensation or other benefit of such employment, position or work, or by means of discharge, demotion or disciplinary action or the threat to impose a discharge, demotion or disciplinary action. This subsection does not apply to employment by a candidate, political party or other registrant under s. 11.05 in connection with a campaign or political party activities.

History: 1973 c. 334; 1983 a. 484; 1991 a. 316.

12.08 Denial of government benefits. No person may, directly or indirectly, cause any person to make a contribution or provide any service or other thing of value to or for the benefit of a candidate, political party or registrant under s. 11.05, with the purpose of influencing the election or nomination of a candidate to national, state or local office or the passage or defeat of a referendum by means of the denial or threat of denial of any payment or other benefit of a program established or funded in whole or in part by this state or any local governmental unit of this state, or a program which has applied for funding by this state or any local governmental unit of this state.

History: 1983 a. 484; 1985 a. 304.

12.09 Election threats. No person may personally or through an agent make use of or threaten to make use of force, violence or restraint in order to induce or compel any person to vote or refrain from voting at an election; or, by abduction, duress or any fraudulent device or contrivance, impede or prevent the free exercise of the franchise at an election; or by any act compel, induce or prevail upon an elector either to vote or refrain from voting at any election for or against a particular candidate or referendum.

History: 1973 c. 334; 1991 a. 316.

12.11 Election bribery. (1) In this section, "anything of value" includes any amount of money, or any object which has utility independent of any political message it contains and the value of which exceeds $1. The prohibitions of this section apply to the distribution of material printed at public expense and available for free distribution if such materials are accompanied by a political message.

(1m) Any person who does any of the following violates this chapter:

(a) Offers, gives, lends or promises to give or lend, or endeavors to procure, anything of value, or any office or employment or any privilege or immunity to, or for, any elector, or to or for any other person, in order to induce any elector to:

1. Go to or refrain from going to the polls.

2. Vote or refrain from voting.

3. Vote or refrain from voting for or against a particular person.

4. Vote or refrain from voting for or against a particular referendum; or on account of any elector having done any of the above.

(b) Receives, agrees or contracts to receive or accept any money, gift, loan, valuable consideration, office or employment personally or for any other person, in consideration that the person or any elector will, so act or has so acted.

(c) Advances, pays or causes to be paid any money to or for the use of any person with the intent that such money or any part thereof will be used to bribe electors at any election.

(2) This section applies to any convention or meeting held for the purpose of nominating any candidate for any election, and to the signing of any nomination paper.

(3) (a) This section does not prohibit a candidate from publicly stating his or her preference for or support of any other candidate for any office to be voted for at the same election. A candidate for an office in which the person elected is charged with the duty of participating in the election or nomination of any person as a candidate for office is not prohibited from publicly stating or pledging his or her preference for or support of any person for such office or nomination.

(b) This section does not apply to money paid or agreed to be paid for or on account of authorized legal expenses which were legitimately incurred at or concerning any election.

(c) This section does not apply where an employer agrees that all or part of election day be given to its employees as a paid holiday, provided that such policy is made uniformly applicable to all similarly situated employees.

(d) This section does not prohibit any person from using his or her own vehicle to transport electors to or from the polls without charge.

(e) This section does not apply to any promise by a candidate to reduce public expenditures or taxes.

History: 1973 c. 334; 1975 c. 93; 1983 a. 484; 1991 a. 316; 1993 a. 213.

There are constitutional limits on the state's power to prohibit candidates from making promises in the course of an election campaign. Some promises are universally acknowledged as legitimate, indeed indispensable to decisionmaking in a democracy. Brown v. Hartlage, 456 U.S. 45 (1982).

12.13 Election fraud. (1) ELECTORS. Whoever intentionally does any of the following violates this chapter:

(a) Votes at any election or meeting if that person does not have the necessary elector qualifications and residence requirements.

(b) Falsely procures registration or makes false statements to the municipal clerk, board of election commissioners or any other election official whether or not under oath.

(c) Registers as an elector in more than one place for the same election.

(d) Impersonates a registered elector or poses as another person for the purpose of voting at an election.

(e) Votes more than once in the same election.

(f) Shows his or her marked ballot to any person or places a mark upon the ballot so it is identifiable as his or her ballot.

(g) Procures an official ballot and neglects or refuses to cast or return it. This paragraph does not apply to persons who have applied for and received absentee ballots.

(h) Procures, assists or advises someone to do any of the acts prohibited by this subsection.

(2) ELECTION OFFICIALS. (a) The willful neglect or refusal by an election official to perform any of the duties prescribed under chs. 5 to 12 is a violation of this chapter.

(b) No election official may:

1. Observe how an elector has marked a ballot unless the official is requested to assist the elector; intentionally permit anyone not authorized to assist in the marking of a ballot to observe how a person is voting or has voted; or disclose to anyone how an elector voted other than as is necessary in the course of judicial proceedings.

2. Illegally issue, write, change or alter a ballot on election day.

3. Permit registration or receipt of a vote from a person who the official knows is not a legally qualified elector or who has refused after being challenged to make the oath or to properly answer the necessary questions pertaining to the requisite requirements and residence; or put into the ballot box a ballot other than the official's own or other one lawfully received.

4. Intentionally assist or cause to be made a false statement, canvass, certificate or return of the votes cast at any election.

5. Willfully alter or destroy a poll or registration list.

6. Intentionally permit or cause a voting machine, voting device or automatic tabulating equipment to fail to correctly register or record a vote cast thereon or inserted therein, or tamper with or disarrange the machine, device or equipment or any part or appliance thereof; cause or consent to the machine, device or automatic tabulating equipment being used for voting at an election with knowledge that it is out of order or is not perfectly set and adjusted so that it will correctly register or record all votes cast thereon or inserted therein; with the purpose of defrauding or deceiving any

challenge. After receiving the notice, the authority shall do one of the following:

(a) Concur with the challenge and correct the information.

(b) Deny the challenge, notify the individual or person authorized by the individual of the denial and allow the individual or person authorized by the individual to file a concise statement setting forth the reasons for the individual's disagreement with the disputed portion of the record. A state authority that denies a challenge shall also notify the individual or person authorized by the individual of the reasons for the denial.

(2) This section does not apply to any of the following records:

(a) Any record transferred to an archival depository under s. 16.61 (13).

(b) Any record pertaining to an individual if a specific state statute or federal law governs challenges to the accuracy of the record.

History: 1991 a. 269 ss. 27d, 27e, 35am, 37am, 39am.

19.37 Enforcement and penalties. (1) MANDAMUS. If an authority withholds a record or a part of a record or delays granting access to a record or part of a record after a written request for disclosure is made, the requester may pursue either, or both, of the alternatives under pars. (a) and (b).

(a) The requester may bring an action for mandamus asking a court to order release of the record. The court may permit the parties or their attorneys to have access to the requested record under restrictions or protective orders as the court deems appropriate.

(b) The requester may, in writing, request the district attorney of the county where the record is found, or request the attorney general, to bring an action for mandamus asking a court to order release of the record to the requester. The district attorney or attorney general may bring such an action.

(1m) TIME FOR COMMENCING ACTION. No action for mandamus under sub. (1) to challenge the denial of a request for access to a record or part of a record may be commenced by any committed or incarcerated person later than 90 days after the date that the request is denied by the authority having custody of the record or part of the record.

(1n) NOTICE OF CLAIM. Sections 893.80 and 893.82 do not apply to actions commenced under this section.

(2) COSTS, FEES AND DAMAGES. (a) Except as provided in this paragraph, the court shall award reasonable attorney fees, damages of not less than $100, and other actual costs to the requester if the requester prevails in whole or in substantial part in any action filed under sub. (1) relating to access to a record or part of a record under s. 19.35 (1) (a). If the requester is a committed or incarcerated person, the requester is not entitled to any minimum amount of damages, but the court may award damages. Costs and fees shall be paid by the authority affected or the unit of government of which it is a part, or by the unit of government by which the legal custodian under s. 19.33 is employed and may not become a personal liability of any public official.

(b) In any action filed under sub. (1) relating to access to a record or part of a record under s. 19.35 (1) (am), if the court finds that the authority acted in a willful or intentional manner, the court shall award the individual actual damages sustained by the individual as a consequence of the failure.

(3) PUNITIVE DAMAGES. If a court finds that an authority or legal custodian under s. 19.33 has arbitrarily and capriciously denied or delayed response to a request or charged excessive fees, the court may award punitive damages to the requester.

(4) PENALTY. Any authority which or legal custodian under s. 19.33 who arbitrarily and capriciously denies or delays response to a request or charges excessive fees may be required to forfeit not more than $1,000. Forfeitures under this section shall be enforced by action on behalf of the state by the attorney general or by the district attorney of any county where a violation occurs. In actions brought by the attorney general, the court shall award any forfeiture recovered together with reasonable costs to the state; and in actions brought by the district attorney, the court shall award any forfeiture recovered together with reasonable costs to the county.

History: 1981 c. 335, 391; 1991 a. 269 s. 43d; 1995 a. 158; 1997 a. 94.

A party seeking fees under sub. (2) must show that the prosecution of an action could reasonably be regarded as necessary to obtain the information and that a "causal nexus" exists between that action and the agency's surrender of the information. State ex rel. Vaughan v. Faust, 143 Wis. 2d 868, 422 N.W.2d 898 (Ct. App. 1988).

If an agency exercises due diligence but is unable to respond timely to a records request, the plaintiff must show that a mandamus action was necessary to secure the records release to qualify for award of fees and costs under sub. (2). Racine Education Association, v. Racine Board of Education, 145 Wis. 2d 518, 427 N.W.2d 414 (Ct. App. 1988).

Assuming sub. (1) (a) applies before mandamus is issued, the trial court retains discretion to refuse counsel's participation in an *in camera* inspection. Milwaukee Journal v. Call, 153 Wis. 2d 313, 450 N.W.2d 515 (Ct. App. 1989).

If the trial court has an incomplete knowledge of the contents of the public records sought, it must conduct an *in camera* inspection to determine what may be disclosed following a custodian's refusal. State ex rel. Morke v. Donnelly, 155 Wis. 2d 521, 455 N.W.2d 893 (1990).

A *pro se* litigant is not entitled to attorney fees. State ex rel. Young v. Shaw, 165 Wis. 2d 276, 477 N.W.2d 340 (Ct. App. 1991).

A favorable judgment or order is not a necessary condition precedent for finding that a party prevailed against an agency under sub. (2). A causal nexus must be shown between the prosecution of the mandamus action and the release of the requested information. Eau Claire Press Co. v. Gordon, 176 Wis. 2d 154, 499 N.W.2d 918 (Ct. App. 1993).

Actions brought under the open meetings and open records laws are exempt from the notice provisions of s. 893.80 (1). Auchinleck v. Town of LaGrange, 200 Wis. 2d 585, 547 N.W.2d 587 (1996).

An inmate's right to mandamus under this section is subject to s. 801.02 (7), which requires exhaustion of administrative remedies before an action may be commenced. Moore v. Stahowiak, 212 Wis. 2d 744, 569 N.W.2d 711 (Ct. App. 1997).

Actual damages are the liability of the agency. Punitive damages and forfeitures can be the liability of either the agency or the legal custodian, or both. Section 895.46 (1) (a) probably provides indemnification for punitive damages assessed against a custodian, but not for forfeitures. 72 Atty. Gen. 99.

19.39 Interpretation by attorney general. Any person may request advice from the attorney general as to the applicability of this subchapter under any circumstances. The attorney general may respond to such a request.

History: 1981 c. 335.

SUBCHAPTER III

CODE OF ETHICS FOR PUBLIC OFFICIALS AND EMPLOYEES

19.41 Declaration of policy. (1) It is declared that high moral and ethical standards among state public officials and state employees are essential to the conduct of free government; that the legislature believes that a code of ethics for the guidance of state public officials and state employees will help them avoid conflicts between their personal interests and their public responsibilities, will improve standards of public service and will promote and strengthen the faith and confidence of the people of this state in their state public officials and state employees.

(2) It is the intent of the legislature that in its operations the board shall protect to the fullest extent possible the rights of individuals affected.

History: 1973 c. 90; Stats. 1973 s. 11.01; 1973 c. 334 s. 33; Stats. 1973 s. 19.41; 1977 c. 277.

19.42 Definitions. In this subchapter:

(1) "Anything of value" means any money or property, favor, service, payment, advance, forbearance, loan, or promise of future employment, but does not include compensation and expenses paid by the state, fees and expenses which are permitted and reported under s. 19.56, political contributions which are reported under ch. 11, or hospitality extended for a purpose unrelated to state business by a person other than an organization.

(2) "Associated", when used with reference to an organization, includes any organization in which an individual or a member of his or her immediate family is a director, officer or trustee, or owns or controls, directly or indirectly, and severally or in the aggregate, at least 10% of the outstanding equity or of which an

is in the public interest. The board shall set forth in writing as a matter of public record its reason for the extension or waiver.

History: 1973 c. 90; Stats. 1973 s. 11.03; 1973 c. 333; 1973 c. 334 s. 33; Stats. 1973 s. 19.43; 1977 c. 223, 277; 1979 c. 221; 1983 a. 166 ss. 5, 16; 1983 a. 484, 538; 1985 a. 29, 304; 1987 a. 399; 1989 a. 31; 1993 a. 266.

Cross Reference: See also chs. Eth 2 and 5, Wis. adm. code.

The extent of confidentiality of investment board nominees' statements of economic interests rests in the sound discretion of the senate committee to which the nomination is referred under sub. (3). 68 Atty. Gen. 378.

The possible conflict between requirements of financial disclosure and confidentiality requirements for lawyers is discussed. 68 Atty. Gen. 411.

Sub. (8) does not authorize the ethics board to extend the date by which a candidate must file a statement of economic interest and cannot waive the filing requirement. 81 Atty. Gen. 85.

19.44 Form of statement. **(1)** Every statement of economic interests which is required to be filed under this subchapter shall be in the form prescribed by the board, and shall contain the following information:

(a) The identity of every organization with which the individual required to file is associated and the nature of his or her association with the organization, except that no identification need be made of:

1. Any organization which is described in section 170 (c) of the internal revenue code.

2. Any organization which is organized and operated primarily to influence voting at an election including support for or opposition to an individual's present or future candidacy or to a present or future referendum.

3. Any nonprofit organization which is formed exclusively for social purposes and any nonprofit community service organization.

4. A trust.

(b) The identity of every organization or body politic in which the individual who is required to file or that individual's immediate family, severally or in the aggregate, owns, directly or indirectly, securities having a value of $5,000 or more, the identity of such securities and their approximate value, except that no identification need be made of a security or issuer of a security when it is issued by any organization not doing business in this state or by any government or instrumentality or agency thereof, or an authority or public corporation created and regulated by an act of such government, other than the state of Wisconsin, its instrumentalities, agencies and political subdivisions, or authorities or public corporations created and regulated by an act of the legislature.

(c) The name of any creditor to whom the individual who is required to file or such individual's immediate family, severally or in the aggregate, owes $5,000 or more and the approximate amount owed.

(d) The real property located in this state in which the individual who is required to file or such individual's immediate family holds an interest, other than the principal residence of the individual or his or her immediate family, and the nature of the interest held. An individual's interest in real property does not include a proportional share of interests in real property if the individual's proportional share is less than 10% of the outstanding shares or is less than an equity value of $5,000.

(e) The identity of each payer from which the individual who is required to file or a member of his or her immediate family received $1,000 or more of his or her income for the preceding taxable year, except that if the individual who is required to file identifies the general nature of the business in which he or she or his or her immediate family is engaged, then no identification need be made of a decedent's estate or an individual, not acting as a representative of an organization, unless the individual is a lobbyist as defined in s. 13.62. In addition, no identification need be made of payers from which only dividends or interest, anything of pecuniary value reported under s. 19.56 or reportable under s. 19.57, or political contributions reported under ch. 11 were received.

(f) If the individual who is required to file or a member of his or her immediate family received $1,000 or more of his or her income for the preceding taxable year from a partnership, limited liability company, corporation electing to be taxed as a partnership under subchapter S of the internal revenue code or service corporation under ss. 180.1901 to 180.1921 in which the individual or a member of his or her immediate family, severally or in the aggregate, has a 10% or greater interest, the identity of each payer from which the organization received $1,000 or more of its income for its preceding taxable year, except that if the individual who is required to file identifies the general nature of the business in which he or she or his or her immediate family is engaged then no identification need be made of a decedent's estate or an individual, not acting as a representative of an organization, unless the individual is a lobbyist as defined in s. 13.62. In addition, no identification need be made of payers from which dividends or interest are received.

(g) The identity of each person from which the individual who is required to file received, directly or indirectly, any gift or gifts having an aggregate value of more than $50 within the taxable year preceding the time of filing, except that the source of a gift need not be identified if the donation is permitted under s. 19.56 (3) (e), (em) or (f) or if the donor is the donee's parent, grandparent, child, grandchild, brother, sister, parent–in–law, grandparent–in–law, brother–in–law, sister–in–law, uncle, aunt, niece, nephew, spouse, fiance or fiancee.

(h) Lodging, transportation, money or other things of pecuniary value reportable under s. 19.56 (2).

(2) Whenever a dollar amount is required to be reported pursuant to this section, it is sufficient to report whether the amount is not more than $50,000, or more than $50,000.

(3) (a) An individual is the owner of a trust and the trust's assets and obligations if he or she is the creator of the trust and has the power to revoke the trust without obtaining the consent of all of the beneficiaries of the trust.

(b) An individual who is eligible to receive income or other beneficial use of the principal of a trust is the owner of a proportional share of the principal in the proportion that the individual's beneficial interest in the trust bears to the total beneficial interests vested in all beneficiaries of the trust. A vested beneficial interest in a trust includes a vested reverter interest.

(4) Information which is required by this section shall be provided on the basis of the best knowledge, information and belief of the individual filing the statement.

History: 1973 c. 90; Stats. 1973 s. 11.04; 1973 c. 334 ss. 33, 57, 58; Stats. 1973 s. 19.44; 1977 c. 277; 1979 c. 110 s. 60 (4), (11); 1983 a. 61; 1983 a. 166 ss. 6, 16; 1983 a. 538; 1989 a. 303, 338; 1991 a. 39; 1993 a. 112, 490; 1995 a. 27.

Cross Reference: See also chs. Eth 2 and 5, Wis. adm. code.

Law Revision Committee Note, 1983: Under the ethics code, each state public official and candidate for state public office must file a statement of economic interests with the ethics board listing the businesses, organizations and other legal entities from which they and their families received substantial income during the preceding taxable year. However, the ethics code does not require identification of individual persons from whom the income is received. This bill provides that if the individual filing the statement of economic interests identifies the general nature of the business in which the individual or a member of his or her family is engaged, then no identification need be made of the estate of any deceased individual from which income was received. This bill makes it unnecessary to identify a decedent's estate which was indebted to a state public official or candidate for state public office, and makes it unnecessary to identify decedents' estates which are represented by lawyer–public officials.

A beneficiary of a future interest in a trust must identify the securities held by the trust if the individual's interest in the securities is valued at $5,000 or more. 80 Atty. Gen. 183.

19.45 Standards of conduct; state public officials. **(1)** The legislature hereby reaffirms that a state public official holds his or her position as a public trust, and any effort to realize substantial personal gain through official conduct is a violation of that trust. This subchapter does not prevent any state public official from accepting other employment or following any pursuit which in no way interferes with the full and faithful discharge of his or her duties to this state. The legislature further recognizes that in a representative democracy, the representatives are drawn from society and, therefore, cannot and should not be without all personal and economic interest in the decisions and policies of government; that citizens who serve as state public officials retain their rights as citizens to interests of a personal or economic na-

ture; that standards of ethical conduct for state public officials need to distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts which are substantial and material; and that state public officials may need to engage in employment, professional or business activities, other than official duties, in order to support themselves or their families and to maintain a continuity of professional or business activity, or may need to maintain investments, which activities or investments do not conflict with the specific provisions of this subchapter.

(2) No state public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated. This subsection does not prohibit a state public official from using the title or prestige of his or her office to obtain contributions permitted and reported as required by ch. 11.

(3) No person may offer or give to a state public official, directly or indirectly, and no state public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the state public official's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the state public official. This subsection does not prohibit a state public official from engaging in outside employment.

(3m) No state public official may accept or retain any transportation, lodging, meals, food or beverage, or reimbursement therefor, except in accordance with s. 19.56 (3).

(4) No state public official may intentionally use or disclose information gained in the course of or by reason of his or her official position or activities in any way that could result in the receipt of anything of value for himself or herself, for his or her immediate family, or for any other person, if the information has not been communicated to the public or is not public information.

(5) No state public official may use or attempt to use the public position held by the public official to influence or gain unlawful benefits, advantages or privileges personally or for others.

(6) No state public official, member of a state public official's immediate family, nor any organization with which the state public official or a member of the official's immediate family owns or controls at least 10% of the outstanding equity, voting rights, or outstanding indebtedness may enter into any contract or lease involving a payment or payments of more than $3,000 within a 12–month period, in whole or in part derived from state funds unless the state public official has first made written disclosure of the nature and extent of such relationship or interest to the board and to the department acting for the state in regard to such contract or lease. Any contract or lease entered into in violation of this subsection may be voided by the state in an action commenced within 3 years of the date on which the ethics board, or the department or officer acting for the state in regard to the allocation of state funds from which such payment is derived, knew or should have known that a violation of this subsection had occurred. This subsection does not affect the application of s. 946.13.

(7) (a) No state public official who is identified in s. 20.923 may represent a person for compensation before a department or any employee thereof, except:

1. In a contested case which involves a party other than the state with interests adverse to those represented by the state public official; or

2. At an open hearing at which a stenographic or other record is maintained; or

3. In a matter that involves only ministerial action by the department; or

4. In a matter before the department of revenue or tax appeals commission that involves the representation of a client in connection with a tax matter.

(b) This subsection does not apply to representation by a state public official acting in his or her official capacity.

(8) Except in the case where the state public office formerly held was that of legislator, legislative employee under s. 20.923 (6) (bp), (f), (g) or (h), chief clerk of a house of the legislature, sergeant at arms of a house of the legislature or a permanent employee occupying the position of auditor for the legislative audit bureau:

(a) No former state public official, for 12 months following the date on which he or she ceases to be a state public official, may, for compensation, on behalf of any person other than a governmental entity, make any formal or informal appearance before, or negotiate with, any officer or employee of the department with which he or she was associated as a state public official within 12 months prior to the date on which he or she ceased to be a state public official.

(b) No former state public official, for 12 months following the date on which he or she ceases to be a state public official, may, for compensation, on behalf of any person other than a governmental entity, make any formal or informal appearance before, or negotiate with, any officer or employee of a department in connection with any judicial or quasi–judicial proceeding, application, contract, claim, or charge which might give rise to a judicial or quasi–judicial proceeding which was under the former official's responsibility as a state public official within 12 months prior to the date on which he or she ceased to be a state public official.

(c) No former state public official may, for compensation, act on behalf of any party other than the state in connection with any judicial or quasi–judicial proceeding, application, contract, claim, or charge which might give rise to a judicial or quasi–judicial proceeding in which the former official participated personally and substantially as a state public official.

(9) The attorney general may not engage in the private practice of law during the period in which he or she holds that office. No justice of the supreme court and no judge of any court of record may engage in the private practice of law during the period in which he or she holds that office. No full–time district attorney may engage in the private practice of law during the period in which he or she holds that office, except as authorized in s. 978.06 (5).

(10) This section does not prohibit a legislator from making inquiries for information on behalf of a person or from representing a person before a department if he or she receives no compensation therefor beyond the salary and other compensation or reimbursement to which the legislator is entitled by law, except as authorized under sub. (7).

(11) The legislature recognizes that all state public officials and employees and all employees of the University of Wisconsin Hospitals and Clinics Authority should be guided by a code of ethics and thus:

(a) The administrator of the division of merit recruitment and selection in the department of employment relations shall, with the board's advice, promulgate rules to implement a code of ethics for classified and unclassified state employees except state public officials subject to this subchapter, unclassified personnel in the University of Wisconsin System and officers and employees of the judicial branch.

(b) The board of regents of the University of Wisconsin System shall establish a code of ethics for unclassified personnel in that system who are not subject to this subchapter.

(c) The supreme court shall promulgate a code of judicial ethics for officers and employees of the judiciary and candidates for judicial office which shall include financial disclosure requirements. All justices and judges shall, in addition to complying with this subchapter, adhere to the code of judicial ethics.

(d) The board of directors of the University of Wisconsin Hospitals and Clinics Authority shall establish a code of ethics for employees of the authority who are not state public officials.

(12) No agency, as defined in s. 16.52 (7), or officer or employee thereof may present any request, or knowingly utilize any interests outside the agency to present any request, to either house

of the legislature or any member or committee thereof, for appropriations which exceed the amount requested by the agency in the agency's most recent request submitted under s. 16.42.

(13) No state public official holding an elective office may, directly or by means of an agent, give, or offer or promise to give, or withhold, or offer or promise to withhold, his or her vote or influence, or promise to take or refrain from taking official action with respect to any proposed or pending matter in consideration of, or upon condition that, any other person make or refrain from making a political contribution, or provide or refrain from providing any service or other thing of value, to or for the benefit of a candidate, a political party, any other person who is subject to a registration requirement under s. 11.05, or any person making a communication that contains a reference to a clearly identified state public official holding an elective office or to a candidate for state public office.

NOTE: Sub. (13) is created eff. 7–1–03 by 2001 Wis. Act 109.

History: 1973 c. 90; Stats. 1973 s. 11.05; 1973 c. 334 ss. 33, 57; Stats. 1973 s. 19.45; 1977 c. 29; 1977 c. 196 s. 130 (2); 1977 c. 223, 277; 1977 c. 418 s. 923 (14); 1977 c. 419, 447; 1979 c. 120; 1983 a. 27 ss. 112, 2200 (15); 1983 a. 166 ss. 7, 16; 1985 a. 332 s. 251 (1); 1987 a. 365; 1989 a. 31, 338; 1991 a. 39, 316; 1995 a. 27; 1997 a. 27; 2001 a. 109.

Cross Reference: See also s. ER–MRS 24.01, Wis. adm. code.

A county board may provide for a penalty in the nature of a forfeiture for a violation of a code of ethics ordinance but may not bar violators from running for office. A violation is not a neglect of duties under s. 59.10 [now 59.15] or an *ipso facto* cause for removal under s. 17.09 (1). 66 Atty. Gen. 148. See also 67 Atty. Gen. 164.

The ethics law does not prohibit a state public official from purchasing items and services that are available to the official because he or she holds public office. If the opportunity to purchase the item or service itself has substantial value, the purchase of the item or service is prohibited. 80 Atty. Gen. 201.

Sub. (12) is an unconstitutional infringement on free speech. Barnett v. State Ethics Board, 817 F. Supp 67 (1993).

19.451 Discounts at certain stadiums. No person serving in a national, state or local office, as defined in s. 5.02, may accept any discount on the price of admission or parking charged to members of the general public, including any discount on the use of a sky box or private luxury box, at a stadium that is exempt from general property taxes under s. 70.11 (36).

History: 1991 a. 37.

19.46 Conflict of interest prohibited; exception. (1) Except in accordance with the board's advice under sub. (2) and except as otherwise provided in sub. (3), no state public official may:

(a) Take any official action substantially affecting a matter in which the official, a member of his or her immediate family, or an organization with which the official is associated has a substantial financial interest.

(b) Use his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official, one or more members of the official's immediate family either separately or together, or an organization with which the official is associated.

(2) Any individual, either personally or on behalf of an organization or governmental body, may request of the board an advisory opinion regarding the propriety of any matter to which the person is or may become a party; and any appointing officer, with the consent of a prospective appointee, may request of the board an advisory opinion regarding the propriety of any matter to which the prospective appointee is or may become a party. The board shall review a request for an advisory opinion and may advise the person making the request. Advisory opinions and requests therefor shall be in writing. The board's deliberations and actions upon such requests shall be in meetings not open to the public. It is prima facie evidence of intent to comply with this subchapter or subch. III of ch. 13 when a person refers a matter to the board and abides by the board's advisory opinion, if the material facts are as stated in the opinion request. The board may authorize the executive director to act in its stead in instances where delay is of substantial inconvenience or detriment to the requesting party. No member or employee of the board may make public the identity of the individual requesting an advisory opinion or of individuals or organizations mentioned in the opinion.

(3) This section does not prohibit a state public official from taking any action concerning the lawful payment of salaries or employee benefits or reimbursement of actual and necessary expenses, or prohibit a state public official from taking official action with respect to any proposal to modify state law or the state administrative code.

History: 1973 c. 90; Stats. 1973 s. 11.06; 1973 c. 334 ss. 33, 57, 58; Stats. 1973 s. 19.46; 1975 c. 422; 1977 c. 223, 277, 449; 1983 a. 166; 1985 a. 29; 1989 a. 338.

19.47 Operation. (1) The office of the board shall be in Madison, but the board may, after proper public notice and in compliance with subch. V, meet or exercise any or all of its powers at any other place in this state.

(2) The board shall appoint an executive director outside the classified service to serve at the pleasure of the board. The executive director shall appoint such other personnel as he or she requires to carry out the duties of the board. The executive director shall perform such duties as the board assigns to him or her in the administration of this subchapter and subch. III of ch. 13.

(3) All members and employees of the board shall file statements of economic interests with the board.

(4) Any action by the board, except an action relating to procedure of the board, requires the affirmative vote of 4 of its members.

(5) No later than September 1 of each year, the board shall submit a report concerning its actions in the preceding fiscal year to the governor and the chief clerk of each house of the legislature, for distribution to the legislature under s. 13.172 (2). Such report shall contain the names and duties of all individuals employed by the board and a summary of its determinations and advisory opinions. The board shall make sufficient alterations in the summaries to prevent disclosing the identities of individuals or organizations involved in the decisions or opinions. The board shall make such further reports on the matters within its jurisdiction and such recommendations for further legislation as it deems desirable.

(6) The joint committee on legislative organization shall be advisory to the board on all matters relating to operation of the board.

History: 1973 c. 90; Stats. 1973 s. 11.07; 1973 c. 334 ss. 33, 57, Stats. 1973 s. 19.47; 1975 c. 426 s. 3; 1977 c. 26, 277; 1983 a. 27, 166, 378; 1987 a. 186; 1989 a. 338; 1991 a. 39, 189.

19.48 Duties of the board. The board shall:

(1) Promulgate rules necessary to carry out this subchapter and subch. III of ch. 13. The board shall give prompt notice of the contents of its rules to state public officials who will be affected thereby.

(2) Prescribe and make available forms for use under this subchapter and subch. III of ch. 13, including the forms specified in s. 13.685 (1).

(3) Accept and file any information related to the purposes of this subchapter or subch. III of ch. 13 which is voluntarily supplied by any person in addition to the information required by this subchapter.

(4) Preserve the statements of economic interests filed with it for a period of 6 years from the date of receipt in such form, including microfilming, optical imaging or electronic formatting, as will facilitate document retention, except that:

(a) Upon the expiration of 3 years after an individual ceases to be a state public official the board shall, unless the former state public official otherwise requests, destroy any statement of economic interests filed by him or her and any copies thereof in its possession.

(b) Upon the expiration of 3 years after any election at which a candidate for state public office was not elected, the board shall destroy any statements of economic interests filed by him or her as a candidate for state public office and any copies thereof in the board's possession, unless the individual continues to hold anoth-

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PERSONNEL POLICY

A. New Employes

Written notification of employment ***must*** be made to the Chief Clerk, as soon as possible by the new employe's appointing authority. The new employe's appointing authority is the State Representative, Chief Clerk, or Caucus Director who hired the employe. The notification should include the ***starting date***, the ***position***, and a ***resume***. The Chief Clerk will review the resume to evaluate ***educational experience***, relevant ***legislative experience*** and ***nonlegislative experience***.

New employes will visit the Assembly Chief Clerk to receive their policy manual and orientation to the Legislature. An appointment will be made with the Legislative Human Resources Office (264-8471) for a benefits orientation. It is extremely important to set up this meeting as soon as possible upon appointment because much of the benefit application process is time sensitive.

1. Progressive Staff Positions

New staff progress through the classification system with experience and on the recommendation of their appointing authority. All staff without prior legislative experience, are hired as Legislative Assistant I (LA 1), Research Assistant I (RA 1), Caucus Analyst I (CA 1), Caucus Secretary I (CS 1), Graphic Artist I (GA 1), unless previously employed by the Legislature in a higher classification. The progression procedure is as follows:

a. The Chief Clerk will assess past experience of new hires. **Relevant** experience is essential. Up to 4 steps of relevant experience will be considered. For example, Legislative Assistant is a secretarial and clerical position. Examples of relevant experiences are word processing and data base capabilities. Research Assistant is a research position. Relevant experiences are in areas which show familiarity with or research and development of legislative policy.

b. A 3% increase **after** six months is automatic for those **without previous legislative experience.**

c. After 12 additional months a Request for Reclassification form will be sent to the employe's appointing authority and on their recommendation, the employe will be reclassed to the LA II, RA II, CA II, or GA II position resulting in about a 7.6% increase.

d. After each additional 22 months of employment, an employe, upon the recommendation of the employe's appointing authority, will be eligible for a step increase until the range maximum is reached. These are 4% increases.

e. When an employe changes jobs within the Assembly, e.g., Legislative Assistant to Research Assistant, they become eligible for a step increase after 22 months from the job change, not from their starting date with the Assembly.

2. Promoted Staff Positions

Promoted staff positions progress differently due to the scope of their responsibilities and experience. An employe is placed in the salary class by the appointing authority. Job classifications that are considered promotional are: Deputy Caucus Director, Senior Caucus Analyst, Administrative Assistant, and Legislative Assistant III. This means, for example, that Administrative Assistant III's do not automatically become Administrative Assistant IV's after a length of time, they must be promoted to that position. However, the salary of these positions may continue to increase at 22 month intervals, up to the maximum of the range, with approval of the appointing authority.

3. Legislative Office Staffing

Speaker	1 Legislative Assistant IV 5 Administrative Assistants
Majority Leader	1 Legislative Assistant III 4 Administrative Assistants
Speaker Pro Tem	1 Legislative Assistant III 2 Administrative Assistants
Minority Leader	1 Legislative Assistant III 4 Administrative Assistants
Chair Joint Finance	1 Legislative Assistant III 3 Administrative Assistants
Asst Majority Leader Majority Caucus Chair	1 Legislative Assistant III 2 Administrative Assistants
Asst Minority Leader Minority Caucus Chair	1 Legislative Assistant III 2 Administrative Assistants
Chair Admin Rules	1 Legislative Assistant 2 Research Assistants
Committee Chairs Joint Finance Mbrs	1 Legislative Assistant 1 Research Assistant
Sophomore Non-Chairs	1 1/2 employes (LA or RA)
Freshman	1 Legislative Assistant

B. Pay Period and Payday

Assembly employes are paid ***monthly***. Checks are available in the Assembly Chief Clerk's Office on the 1st of the month. If the 1st falls on a weekend, checks will be available after 3 p.m. on the preceding Friday. If an employe is absent from work on payday, arrangements can be made with the Chief Clerk's Office to mail the check to the employe's home or bank. In this case, advance notification and special instructions will be required. In all other circumstances the check will remain in the Clerk's Office until the employe picks it up.

C. Political Activity

Political activity is not permitted during working hours. State owned facilities, office equipment, supplies, etc., may not be used for political purposes anytime. Citizenship rights to political activity and community involvement must be exercised on non-office time.

13.625(3) of the Wisconsin Statutes states: No candidate for an elective state office, elective state official, agency official or **legislative employe** (emphasis added) of the state may solicit or accept anything of pecuniary value from a lobbyist or principal, except as permitted under subs. (1)(b)(3), (c)(2), (5), (6), and (7).

> *(1)(b)(3) Food, meals, beverages, money or any other thing of pecuniary value, except that a lobbyist may make a campaign contribution to a partisan elective state official or candidate for national, state or local office or to the official's or candidate's personal campaign committee.*
>
> *(c)(2) Except as permitted in this subsection, make a campaign contribution as defined in s. 11.01(6), to a partisan elective state official for the purpose of promoting the official's election to any national, state or local office, or to a candidate for a partisan elective state office to be filled at the general election or a special election, or the official's or candidate's personal campaign committee. A campaign contribution to a partisan elective state official or candidate for partisan elective state office or his or her personal campaign committee may be made in the year of candidate's election between June 1 and the day of the general election, except that: 2. A campaign contribution by a lobbyist to the lobbyist's campaign for partisan elective state office may be made at any time.*
>
> *(5) This section does not apply to food, meals, beverages or entertainment provided by the governor when acting in an official capacity.*
>
> *(6) Subsections (1)(b) and (c), (2) and (3) do not apply to the furnishing of anything of pecuniary value by an individual who is a lobbyist or principal to a relative of the individual or an individual who resides in the same household as the individual, nor to the receipt or anything of pecuniary value by that relative or individual residing in the same household as the individual.*

(7) This section does not apply to the furnishing or receipt of a reimbursement or payment for actual and reasonable expenses authorized under s.19.56.

D. Nepotism

According to the State Ethics Board nepotism is **prohibited** by sec. 19.45(2), Stats., of the Ethics Code. This statute, in the Board's view, prohibits a state public official from using his or her office to bring about the employment by the state of the official's spouse or a dependent relative.

Thus, the Board suggests a public official should neither: (1) hire as a state employe; nor (2) advocate the hiring or promotion by the state of a person who is the official's parent, grandparent, grandchild, brother, sister, parent-in-law, grandparent-in-law, brother-in-law, sister-in-law, uncle, aunt, niece, or nephew. The Board also suggests that an official, in order to avoid appearances of favoritism, not have his/her spouse, dependent relative (dependent as defined by the IRS) or any other of the aforementioned relatives under his/her jurisdiction or supervision.

E. Affirmative Action and Equal Employment Opportunity

The Assembly Organization Committee has adopted the following Equal Employment and Affirmative Action Policy:

1. Equal Employment Opportunity

The various appointing authorities of the Wisconsin State Assembly shall provide fair and equitable treatment to all employes and shall comply with state and federal legislation. Assembly appointing authorities shall provide equal employment opportunity in all terms, conditions or privileges of employment, including recruitment, selection, training, promotions, layoffs, disciplinary actions or terminations. Assembly appointing authorities shall evaluate an employe or applicant for employment based upon the employe's or applicant's individual qualifications rather than upon a particular class to which the employe or applicant may belong. [s. 111.31 (2), Stats.]

None of the Assembly appointing authorities may discriminate in employment on the basis of race, color, sex, marital status, religion, national origin or ancestry, age, handicap, sexual orientation, partisan political opinions or affiliations or arrest or conviction record. However, it is not discrimination to recruit, select or employ persons on the basis of partisan political opinions or affiliation where the appointing authority can demonstrate that partisan political opinions or affiliation is an appropriate requirement for the effective performance of the position involved. [ss. 111.321 and 230.18, Stats.; Branti v. Finkel, 445 U.S. 518 (1980)]

Within the State Assembly, state law prohibits harassment by, and harassment of, Assembly employes on the basis of race, color, sex, marital status, religion, national origin or ancestry, age, handicap, sexual orientation, partisan political beliefs or arrest or conviction record. "Harassment," for purposes of this policy, is defined as unwelcome and repeated verbal or physical conduct inappropriate to the context in which the conduct occurs which interferes with

an employe's work performance or creates an intimidating, hostile or offensive working environment. [s. 111.322 and 111.36 (1) (b), Stats.]

The State Assembly shall provide reasonable accommodations to handicapped persons to ensure equal access to employment unless the accommodation would impose a hardship upon the operation of the Assembly. Accommodations include, but are not limited to: accessible facilities; job restructuring; part-time or modified work schedules; acquisition or modification of equipment; and, for an employe who becomes handicapped, assignment to an alternative position with comparable pay if possible. It is not employment discrimination because of handicap to refuse to hire any individual, to terminate from employment any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment if the handicap is reasonably related to the individual's ability to adequately undertake the job related responsibilities of that individual's employment. [s. 111.34 (1), Stats.]

2. Affirmative Action

Assembly appointing authorities shall identify and eliminate present effects of past discrimination in employment. Assembly appointing authorities shall take affirmative action including, as necessary, the development of a plan and the achievement of goals to increase employment of (1) women, (2) ethnic and racial minorities, and (3) the handicapped. The Speaker of the Assembly shall designate the State Assembly's affirmative action officer who is assigned the applicable duties under s. 230.06 (1) (k), Stats. When appropriate, the affirmative action officer shall advise and assist Assembly appointing authorities in establishing programs to ensure equal opportunity and affirmative action. All Assembly appointing authorities are directly responsible for successful application of the Assembly's affirmative action policy. [s. 230.06 (1) (k), Stats.]

3. Complaint and Enforcement Procedure

Any State Assembly employe who believes that he or she has been harassed or discriminated against, in violation of this policy, may file a complaint with the Speaker or the Minority Leader of the State Assembly, or their designees, or the Assembly's affirmative action officer, Charles Sanders (266-1501), without foreclosing any other means provided by law for obtaining redress.

An employe or other person filing a complaint will be asked to prepare a written account of the incident. The complaint will be treated confidentially, except as necessary to resolve the complaint and as agreed upon by the complainant. The complainant and other persons involved will be encouraged to resolve the problem through negotiation.

Complainants will also be informed that they may file complaints with the State Personnel Commission or the Federal Equal Employment Opportunities Commission (EEOC).

Complaints may be filed with the Personnel Commission by contacting the State Personnel Commission, 121 East Wilson Street, 2nd Floor, Madison, WI 53702, telephone: (608) 266-1995.

Complaints may be filed with the Federal EEOC by contacting Equal Employment Opportunities Commission, 342 North Water Street, Milwaukee, WI 53202, telephone: (414) 291-1111.

F. Military Leave

Up to 15 days (excluding weekends and holidays) are allowed for annual active military duty. The leave may be taken without loss of vacation time or state pay. The absence from work must be at least 3 days to qualify for military leave. Compensation from the state will be based on the state pay minus the military pay. The employe's combined state and military pay is not to exceed the amount of state pay.

Employes are allowed to use vacation time to receive full state pay as well as military pay.

G. Jury Duty

An employe receives full pay while serving jury duty and need not use vacation or sick leave for jury service. Remittance of jury pay to the Assembly is not required. When an employe is not impaneled for actual jury service but is on call, the employe must report to work.

H. Resignation and Termination

Upon resignation and after notification to the employe's appointing authority an employe must provide written notice to the Chief Clerk of the date of the last day of employment and any earned unused vacation days. The vacation time is prorated for that year and can be transferred to another state agency if the agency is willing to accept the vacation liability. Employes who leave before six months or less of employment are not compensated for any vacation. If leaving state employment, earned unused vacation leave may be paid on the final check or on the first of the following month.

I. Compensation Adjustment

The General Discretionary Award (GDA) is provided by law and determined by the Joint Committee on Legislative Organization and the Committee on Assembly Organization. This compensation was formerly known as the "Cost of Living Adjustment (COLA)." As the title implies, this compensation award is at the discretion of the appointing authority.

J. Service as an Election Official

Under s. 7.33 Wis. Stats., each employe who is appointed to serve as an election official is granted a leave for the entire 24 hours of each election day. The employe need not take vacation/sick leave. If the employe doesn't take vacation/sick leave, the employe must have the compensation paid for service as an election official deducted from the next paycheck.

K. Leave to Run for Partisan Office

Long standing Assembly Policy states that Assembly staff must take leave to run for a partisan elected office. The leave must start the first day of circulation of nomination papers. It continues until after the date of the election or after the date of the primary election if the person appears as a candidate on a primary election ballot and is not nominated at the primary election.

L. Vacation

Vacation time is allotted the last day of the year. Vacation/sick is prorated for new hires, from the start date to the end of the year. If you terminate, vacation/sick is prorated from the first of the year until you leave. If an employe works six months or less, no vacation leave is granted. Prior approval for vacation is required by an employe's appointing authority i.e., State Representative, Chief Clerk or Caucus Director. On the 1st of January **after** the 5th, 10th, 15th, 20th, and 25th year of service, vacation time (annual leave) is increased as follows:

1- 5 years	10 days/80 hrs
5-10 years	15 days/120 hrs
10-15 years	17 days/136 hrs
15-20 years	20 days/160 hrs
20-25 years	22 days/176 hrs
25 + years	25 days/200 hrs

It is recommended that employes use vacation time in the year it is earned. **If not, unused vacation time may be automatically carried over for the first six months of the following year. All attempts should be made to use carried over vacation in that first six months. If that is not possible, an additional six month extension can be obtained from the employe's appointing authority. Written notification of this extension must be received by June 30th of the year of the extension. That notification should be sent to the Legislative Human Resources Office (LHRO). This extension approval will last through December 31 of that year. Any vacation carried over from the previous year and not used will be lost at that time.**

Please note that this policy is in effect for vacation earned from January 1, 1996 forward. Vacation balances prior to January 1, 1996 are carried forward indefinitely.

When employes terminate employment with the Assembly, payment is made for any unused vacation. **If an employe uses more vacation/sick time than is actually due, the unearned balance is subtracted from the employe's check.** A vacation/sick leave slip is distributed monthly to be filled out by the employe, and is to be signed by the employe's appointing authority and returned to the LHRO. This leave slip is the vehicle for reporting used time. Please report all time used in hours. The completed sheets are entered in the leave accounting system to adjust totals. Balances remaining are shown on the right hand side of the employe's check stub.

M. 5th Week Leave

After 25 years of employment in State Government, employes are entitled to five weeks of annual leave (vacation) . Section 230.35 (1p) states that these employes may take the fifth week as cash. A memo will be sent to those qualifying employes each year.

N. Sick Leave

Employes earn sick leave at a rate of 1 and 1/12 days or 8.66 hours per month. Unused sick leave is accumulated year to year. Sick leave may be used for personal injury, illness, maternity leave, exposure to contagious disease, and illness or death in the ***immediate family of the employe or spouse***. A vacation/sick leave slip is distributed monthly to be filled out by the employe, signed by the employe's appointing authority and returned to the Legislative Human Resources Office.

For purposes of this section, immediate family means spouse, parents, grandparents, foster parents, children, step-children, grandchildren, foster children, brothers and sisters and their spouses, both of the employe and of the employe's spouse. Also included are any other relatives of the employe or employe's spouse provided they reside in the same household as the employe.

The number of sick days accumulated is one factor used to determine the premiums for income continuation insurance and if an employe retires and goes on immediate annuity, unused sick leave may be used to pay health insurance premiums. Upon termination of employment, an employe may not receive financial compensation for unused sick leave.

O. Compensatory Leave

All Assembly employes are required to work a minimum average of 37.5 hours per week. Work hours are 8:30 a.m. to 12:00 noon and 1:00 p.m. to 5:00 p.m. The appointing authority may also set the work hours for the office. There is no additional compensation for overtime work as salaries are considered to be commensurate with employe responsibilities. The appointing authority may authorize compensatory time off for hours in excess of the minimum for employes in the legislative assistant and clerical classifications required for late night session. Other positions do not receive compensatory time.

P. Leave of Absence

An employe must have written prior approval for any leave of absence from the employe's appointing authority. The letter submitted to the Chief Clerk must specify the beginning and ending dates of the leave and whether the employe is using sick/vacation time or whether the leave is unpaid. Employes are allowed to prepay their insurance benefits for up to three months if the leave is unpaid. Arrangements for this option should be included in the letter to the Chief Clerk. If the Leave is Family or Medical the employe must file a ***REQUEST FOR MEDICAL OR FAMILY LEAVE FORM***, which may be picked up in the Legislative Human Resources Office.

Q. Family and Medical Leave

The federal law provides that an employe is entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

1. Because of the birth of a son or daughter of the employe, in order to care for the son or daughter.

2. Because of the placement of the son or daughter with the employe for adoption or foster care.

3. In order to care for the spouse, child or parent of the employe if the spouse, child or parent has a serious health condition.

4. Because of a serious health condition of the employe that makes the employe unable to perform the functions of his or her position [s. 102 (a) (1)] [Legislative Council Information Memorandum 93-1].

The following are a few key points regarding the relationship of Family or Medical Leave to other leave:

1. An employe may substitute accrued paid leave (e.g., sick leave or vacation leave) for the unpaid Medical Leave or Family Leave.

2. Use of sick leave for an employe's own illness or maternity will result in simultaneous use of Medical Leave. Similarly, use of sick leave to care for a sick family member will result in simultaneous use of that portion of Family Leave available for the medical treatment or medical supervision of an employe's child, spouse or parent.

3. Use of accrued vacation leave will result in simultaneous use of Family Leave or Medical Leave only if the employe requests the substitution. If an employe is eligible to take Medical or Family Leave and requests to substitute vacation leave, the request must be granted and the employe's vacation leave and Family or Medical Leave will be used up simultaneously. If, on the other hand, the employe requests to use vacation leave, the employe does not request

Family or Medical Leave and the employer approves the vacation leave, there will be no simultaneous use of Family or Medical Leave.

Assembly employes must file the Wisconsin State Assembly ***FAMILY OR MEDICAL LEAVE REQUEST FORM*** which may be acquired from the Legislative Human Resources Office, as follows:

1. In advance of leave for ***planned*** Family or Medical Leave (e.g., leave due to the birth or adoption of a child; the planned care of a child, spouse or parent; or the employe's own planned medical treatment).

2. With reasonable promptness after the employe learns of the probable necessity of leave for unplanned Family or Medical Leave (e.g., leave for unplanned medical treatment or care of the employe or his or her child, spouse or parent).

Assembly employes who plan to take Family or Medical Leave as partial absences must provide their proposed leave schedule to the Legislator, office or caucus for which the employe works as follows:

1. In advance of any Family Leave for birth or adoption.

2. With reasonable promptness after the employe learns of the probable necessity for other Family or Medical Leave.

Except as precluded by the need for medical treatment, the schedule must be definite enough to allow replacement employes to be scheduled, if needed.

R. Open Records Law

Much of the material in a Legislator's office or kept by a Legislator qualifies as a public "record" under Wisconsin's open records law [s. 19.31 to 19.39, Stats]. Therefore, this material is required by law to be available for inspection and copying by members of the public, including the news media. Steps by which a Legislator may deal with a request to inspect records in his or her office follow: [Legislative Council Information Bulletin 91-3]

1. Clarify, in advance, who is the "custodian" of the office's records

The custodian is the person who responds to a request to inspect records. Each Legislator is automatically the custodian of his or her records, unless an office staff member is designated as custodian. A Legislator and his or her staff should have a clear understanding of who makes the decisions when responding to a request to inspect records.

In most cases, it appears preferable that a Legislator retain the role of custodian of his or her records, since the Legislator is the person directly affected by an inappropriate release of records. Note, however, that in the event that a request is made during a period of time that a Legislator is

unavailable (e.g., a vacation), action on the request will be delayed. The law makes no provision for appointment of a temporary custodian under such circumstances.

2. Respond reasonably promptly to a request

A response to a record request must be made "as soon as practicable and without delay" under the law. In practical terms, a custodian may need some amount of time to retrieve and inspect the record before formulating a response. However, a prompt response, such as immediately, within the hour or within 24 hours, is desirable.

The response to a request for a record is either (a) to provide the record or (b) to deny the request, in whole or in part. If the request is denied, the reasons for the denial must be given.

3. Respond to a request in kind

If the request is made orally, and is going to be denied, the denial may be made orally. If a requester who was orally denied a request later demands a written statement of denial, and the demand is made within five business days of the oral denial, the written statement must be provided.

If a request is made in writing, the response must be in writing giving the reasons for the denial. Written responses to written requests must include this statement -- "This denial is subject to review by mandamus under s. 19.37 (1), Stats., or by application to the Attorney General or a district attorney."

4. Demand that a request be reasonably specific

A request must be honored if it "reasonably describes the requested record or the information requested." However, requests to go through an office's files (a "fishing expedition") do not have to be honored.

For example, requests such as the following must be given a response: "All constituent mail on Assembly Bill 000"; "the mailing list for your newsletter distribution"; "all correspondence on the Highway XO project in your district." Also, there is not blanket exemption for constituent mail--in most cases, it is a "record."

5. Seeking identity of requester; purpose of request

A records request may not be denied because the requester refuses to provide identification or to state the purpose of the request. However, always ask these questions. Also, if the record is at a private residence, or valid security reasons exist, a requester may be required to show acceptable identification.

6. Decide if the requested material is a "record"

A record is any material which bears information, regardless of form ("written, drawn, printed, spoken, visual or electromagnetic information") and which was created or is being kept by a custodian, EXCEPT:

a. Personal property of the Legislator which has no relation to his or her office of Legislator;

b. Drafts, notes, preliminary computations and similar material prepared for the personal use of the Legislator or prepared in the name of a Legislator by a member of his or her staff;

c. Material to which access is limited by copyright, patent or bequest; and

d. Published materials which are available for sale or are available at a public library.

If a requested material falls into one of the above exceptions, it is not a "record" and the request may be denied for that reason.

7. Make a decision on the request

The open records law favors inspection of public records, and establishes a presumption of complete access to public records. Access may be denied only in exceptional cases--that is, in cases where it can be demonstrated that the harm done to the public interest by disclosure outweighs the right to access to public records.

In some instances, access to records may be denied. However, any denial must specifically demonstrate that there is a need to restrict public access at the time that the request is made.

The exemptions to the open meetings law are used as a guide for denial. The applicable exemptions in that law are:

a. "Deliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before that governmental body."

b. "Considering dismissal, demotion, licensing or discipline of any public employe or person licensed by a public body or the investigation of charges against such person...and the taking of formal action on any such matter...."

c. "Considering employment, promotion, compensation or performance evaluation data of any public employe over which the governmental body has jurisdiction or exercises responsibility."

d. "Deliberating or negotiating the purchasing of public properties, the investing of public funds or conducting other specific public business, whenever competitive or bargaining reasons require a closed session."

e. "Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons...which, if discussed in public, would be likely to have a substantial adverse effect on the reputation of any person referred to in such histories or data, or involved in such problems or investigations."

f. "Conferring with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved."

g. "Consideration of requests for confidential written advice from the ethics board under s. 19.46 (2), or from any local government ethics board."

h. "Considering any and all matters related to acts by businesses under s. 560.15 [Economic adjustment program where a business is shutting down or laying off] which, if discussed in public, could adversely affect the business, its employes or former employes."

[In addition to the above, meetings can also be closed to discuss probation or parole applications, crime fighting strategy, burial sites, ice rink operation and certain Unemployment Compensation Advisory Council matters. In specific situations, these less-common grounds may be applicable to a records request made to a Legislator.]

In addition, the Wisconsin Supreme Court has stated that access to information collected under a pledge of confidentiality, where the pledge was necessary to obtain the information, may be denied. Last, the open meetings law exempts a record from access if: (a) federal or state law requires nondisclosure; (b) the record is a computer program; or (c) the record is a trade secret.

8. Partial denial

If part of a record qualifies for confidential treatment, the remainder must be released. In those instances, either separate the confidential information, or delete it, and release the remainder.

9. Provide copies, on request

Persons having a right to inspect a record are entitled to a copy, if they ask for it. The custodian should copy the record, to retain control over the original record. Copy charges are $.10 per copy. Checks and cash should be deposited in the Assembly Chief Clerk's Office. Checks may be made out to the Assembly Chief Clerk.

S. The Americans with Disabilities Act

The Americans with Disabilities Act (ADA) extends to people with disabilities civil rights similar to those now available o the basis of race, color, sex, national origin, and religion through the Civil Rights Act of 1964. It prohibits discrimination on the basis of disability in private sector employment, in state and local government activities, in public accommodations and services, including transportation, provided by public and private entities.

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Employment Provisions

1. ADA prohibits discrimination against workers and job applicants with disabilities. This provision is based on the Civil Rights Act of 1964 and Title V of the Rehabilitation Act of 1973.

2. Beginning in July 1992, it would apply to all businesses employing 25 or more individuals and then in July 1994 to all employing 15 or more.

3. ADA requires equal opportunity in selection, testing and hiring of qualified applicants with disabilities.

4. ADA requires equal treatment in promotion and benefits similar to other civil rights legislation.

5. ADA requires reasonable accommodation for workers with disabilities when such accommodations would not impose "undue hardship." Reasonable accommodation is a concept already familiar to and widely used in today's workplace. [The Administration on Developmental Disabilities]

T. Computer Software (Unauthorized Copying)

The Assembly does not condone the illegal duplication of software. The copyright law is clear. The copyright holder (ie., manufacturer) is given certain exlusive rights, including the right to make and distribute copies. Title 17 of the U.S. Code states that "it is illegal to make or distribute copies of copyrighted material without authorization" (Section 106). The only exception is the users' right to make a backup copy for archival purposes (Section 117).

The law protects the exclusive rights of the copyright holder and does not give users the right to copy software unless a backup copy is not provided by the manufacturer. Unauthorized duplication of software is a federal crime. Penalties include as much as $250,000, and jail terms of up to five years.

Even the users of unlawful copies suffer from their own illegal actions. They receive no documentation, no customer support and no information about product updates.

1. The Assembly licenses the use of computer software from a variety of outside companies. The Assembly does not own this software or its related documentation and, unless authorized by the software manufacturer, does not have the right to reproduce it.

2. With regard to use on local area networks or on multiple machines, Assembly employes shall use the software only in accordance with the license agreement.

3. Assembly employes learning of any misuse of software or related documentation within the Legislature shall notify the Chief Clerk of the Assembly, Charles Sanders.

4. According to the U.S. Copyright Law, illegal reproduction of software can be subject to civil damages and criminal penalties, including fines and imprisonment. Assembly employes who make, acquire or use unauthorized copies of computer software shall be disciplined as appropriate under the circumstances.

U. Use of E-mail

E-mail is encouraged as a means of increasing government staff efficiency in making necessary contacts. All outgoing messages both Internet and intrastate, identify that the message is originating from the State of Wisconsin as well as from the State Assembly. Therefore, all communication needs to be professional in tone and content.

It must be recognized that the content of any E-mail, including communications for non-business purposes, is not protected from public disclosure and may be considered a public record under Wisconsin law.

V. Internet Policy

Members and staff of the Wisconsin State Assembly have access to the Internet through computers in their offices. Usage of the Internet is to be for work-related purposes only. Personal, commercial or political usage of Internet access through the computers owned by the state is strictly forbidden. It is prohibited to use the Internet access through the State Assembly for any purposes which violate any state or federal laws, regulations, policies or procedures. It is not acceptable to use the Assembly Internet access in a manner that disrupts normal network use and service. Such disruption would include the propagation of computer viruses, the violation of personal privacy and the unauthorized access to protected and private network resources. Also be aware of the fact that documents created on or through the Internet could be subject to the Open Records Laws of the State of Wisconsin.

The ramifications of violating the Assembly Internet Policy may range from restriction of Internet access in the future to possible termination.

W. Workers Compensation

If an employe suffers an injury or illness as a result of his/her employment, medical expenses and wage loss may be covered by provisions of the Worker's Compensation Act. Any injury or illness suspected of being a result of employment should be reported to the Legislative Human Resources Office as soon as possible (264-8471).

Charles R. Sanders

Assembly Chief Clerk

TO: Legislators and Staff

FROM: Charlie Sanders
Assembly Chief Clerk

DATE: May 16, 2000

RE: **AN OUNCE OF PREVENTION!**

KEY STANDARDS OF CONDUCT AND STATUTORY REFERENCES

⇒Don't take favors from lobbyists! {(13.625(1)(b)}
⇒Don't take favors from organizations that employ lobbyists! {13.625(1)(b) and (2)}
⇒Don't take favors unless official can clearly demonstrate it was offered for a reason unrelated to holding or have held a government position! {19.45(3m)}

Exceptions

- Expenses for talks and programs {19.56(3)(a)}
- Educational and informational materials {13.625 (6t) and 19.56(3)(c)}
- Items available to general public {13.625(2)}
- Commerce and Tourism events {19.56(3)(e) and (f)}

ADDITIONAL STANDARDS AND STATUTORY REFERENCES

- Use of office for personal gain {19.45(2)}
- Matters in which official, family, or business if financially interested {19.46(1)}
- Soliciting contributions {19.45(3)}
- Lobbyists' and principals' campaign contributions {13.625(1)(b)3 and (c)}

Following are a few other reminders to assist employees in understanding the relationship between campaign activities and state job-related responsibilities.

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1 East Main Street • Suite 402 • Madison, WI 53708 • (608) 266-1501
FAX: (608) 266-7038 • E-Mail: charlie.sanders@legis.state.wi.us

DEFINITION: CAMPAIGN ACTIVITY OR PURPOSE --

"Campaign activity" or campaign purpose" means an activity or purpose arising independently of official functions and a substantial effect or purpose of which is to influence the voting at any election (other than a referendum) or to promote or to discourage support of anyone's present or future candidacy for election to public office.

USE OF STATE TIME, FACILITIES, SUPPLIES AND SERVICES –

Employees should not engage in a campaign activity:

(a) With the use of the state's supplies, services, or facilities not available to all citizens;
(b) During hours for which he or she is compensated by the State of Wisconsin;
(c) At his or her office regardless of whether the activity takes place during regular office hours.

Campaign activities prescribed under these circumstances include:

(a) Writing or calling any organization (including labor, business, or civic association) to request a person's appearance at a campaign activity;
(b) Assisting in renting a hall, ordering supplies, or addressing/labeling materials for a campaign activity;
(c) Participating in the preparation or presentation of a speech or brochure to be used primarily for a campaign activity;
(d) Soliciting or receiving contributions of money, supplies, facilities, or services for a campaign purpose while on state time;
(e) Inviting people to attend a campaign activity;
(f) Displaying of campaign posters or literature promoting any person's candidacy for election to public office. Materials may not be distributed, displayed, or stored on any property owned or leased by the State of Wisconsin and used primarily by the officers and employees of the State of Wisconsin.

USE OF STATE TELEPHONES –

Wisconsin legislators and employees should not use the state's telephone equipment (office or cell phone) for campaign activities whether the telephone call is initiated or received. The Ethics Board recognizes, however, that a legislator or employee is likely to receive some telephone calls related to campaign activities. The Board also recognizes that calls of this type are isolated, infrequent, and difficult to avoid. If a legislator or employee receives a telephone call related to campaign activities at his or her office or on a state cell phone line, the legislator or employee should not pursue the conversation but, as courtesy permits, disengage him or herself from that conversation.

Replies or inquiries about the legislator's schedule and statements are related directly to official functions. This guideline does not prevent any campaign organization from obtaining information from an office so that the organization can schedule campaign activities to avoid conflicts with official functions.

USE OF GOVERNMENT MATERIALS AFTER JUNE 1, 2000

Also, remember that as of ***June 1 no candidate for state office can distribute or purchase 50 or more identical items paid for by state funds.*** This includes:

- Newsletters or other legislative literature printed and mailed using your office account;
- Highway maps, Capitol guide books, flags, stickers, magnets or any other items purchased through your office account or with state moneys.

COMMONLY ASKED QUESTIONS:

Q. Am I able to mail "50 or more" of the same piece if I split it up and send them on different days or weeks?

A. No. You are prohibited from mailing a total of 50 or more of the same item for the entire period of June 1 thru November 7. EXAMPLE: If you sent 3 highway maps on June 6, 18 maps on July 13 and 4 maps on August 30 you could only send out 25 more maps up to November 7.

Q In my newsletter, I listed a number of items available to my constituents including maps, tourism guidebooks, Blue Books, etc. What if I receive more than 50 requests for these items? As long as they're requesting them can't I send more than 50?

A. No. Only the first 49 requests can be filled. Constituents requesting items after that time can be referred directly to Tourism or the appropriate state agency for maps, guidebooks, etc.

Q. I want to post our latest newsletter, press release or column on our website. Does this posting count as one of the 50?

A. Yes it does. You are allowed to mail, FAX or E-Mail only 48 more of the same.

If you have a question about these guidelines or a situation not described above, please contact our office. You may also contact the Ethics Board or the Elections Board directly. Discussions are confidential.

ETHICS BOARD -- 266-8123 (R. Roth Judd, Jonathan Becker or Jaclyn Seigel)
ELECTIONS BOARD -- 266-8005 (Kevin Kennedy or George Dunst)

Charles R. Sanders

Assembly Chief Clerk

DATE: April 26, 2000

TO: All Assembly Members and Staff

FROM: Charles R. Sanders, Assembly Chief Clerk

SUBJECT: USE OF GOVERNMENT MATERIALS BY CANDIDATES AFTER JUNE 1, 2000 (THE FIRST DAY FOR CIRCULATION OF NOMINATION PAPERS)

As the 1999-2000 floor session draws to a close, I thought I should remind you that ***effective June 1 no candidate for state office can distribute 50 or more identical items paid for by state funds.*** This includes highway maps, Capitol guide books, flags, stickers, magnets or any other items purchased through your office account or with state moneys.

Specifically, Section 11.33 of the Wisconsin Statutes reads:

(1)(a) No person elected to state or local office who becomes a candidate for national, state or local office may use public funds for the cost of materials or distribution for 50 or more pieces of substantially identical material distributed after:

(1) In the case of a candidate who is nominated by nomination papers, the first day authorized by law for circulation of nomination papers as a candidate.

(b) This subsection applies until after the date of the election or after the date of the primary election if the person appears as a candidate on a primary election ballot and is not nominated at the primary election.

(2) This section does not apply to use of public funds for the cost of the following, when not done for a political purpose:

(a) Answers to communications from constituents.

-over-

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Charles R. Sanders

Assembly Chief Clerk

REMINDER REMINDER REMINDER

DATE: November 9, 1999

TO: **Assembly Members Who Hold (or are considering running for) A Local Elected Position** (School Board or Town, City, Village, County Board).

FROM: CHARLIE SANDERS
Assembly Chief Clerk

SUBJECT: Use of Government Materials by Candidates

If you are a local office holder up for reelection or are considering running for a position on one of your local boards in Spring 2000, ***remember:*** Section 11.33 of the Wisconsin Statues applies to local candidacies as well as to your state legislator position.

Section 11.33 of the Wisconsin Statutes states as follows:

(1) (a) No person elected to state or local office who becomes a candidate for national, state or local office may use public funds for the cost of materials or distribution for 50 or more pieces of substantially identical material distributed after:

(1) In the case of a candidate who is nominated by nomination papers, the first day authorized by law for circulation of nomination papers as a candidate.

(3) In the case of a candidate who is nominated at a caucus, the date of the caucus.

(b) This subsection applies until after the date of the election or after the date of the primary election if the person appears as a candidate on a primary election ballot and is not nominated at the primary election.

(2) This section does not apply to use of public funds for the cost of the following, when not done for a political purpose:

(a) Answers to communications of constituents.

(OVER)

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(c) Actions taken by a state or local government administrative officer pursuant to a specific law, ordinance or resolution which authorizes or directs the actions to be taken.

(d) Communications not exceeding 500 pieces by members of the legislature relating solely to the subject matter of a special session or extraordinary session, made during the period between the date that the session is called or scheduled and 14 days after adjournment of the session.

(3) Except as provided in sub. (2), it is not a defense to a violation of sub. (1) that a person was not acting with a political purpose. This subsection applies irrespective of the distributor's intentions as to political office, the content of the materials, the manner of distribution, the pattern and frequency of distribution and the value of the distributed materials.

This section of the statutes has been interpreted by the Elections Board to apply to both legislative newsletters and other state publications. In addition, Section 11.33 makes it illegal to not only distribute literature, but also to purchase materials for distribution with state moneys. This has the practical effect of disallowing representatives from using office funds to purchase state highway maps, brochures, Capitol Guide books, How a Bill Becomes a Law, etc., (over 49 pieces total) for distribution in any manner after the first day authorized by law for circulation of nomination papers. Please keep this in mind when ordering any publications through the Chief Clerk's office after the first day for circulation of nomination papers.

NOTE: Nomination papers for the April 4, 2000 election can be circulated beginning Wednesday, December 1st and are due by 5:00 p.m., Tuesday, January 4, 2000.

REMINDER

TO: All State Legislators and Staff

FROM: CHARLES R. SANDERS
Assembly Chief Clerk

DATE: May 28, 1998

RE: USE OF GOVERNMENT MATERIALS BY CANDIDATES AFTER THE FIRST DAY FOR CIRCULATION OF NOMINATION PAPERS (JUNE 1, 1998)

Section 11.33 of the Wisconsin Statutes states as follows:

(1) (a) No person elected to state or local office who becomes a candidate for national, state or local office may use public funds for the cost of materials or distribution for 50 or more pieces of substantially identical material distributed after:

(1) In the case of a candidate who is nominated by nomination papers, the first day authorized by law for circulation of nomination papers as a candidate.

(b) This subsection applies until after the date of the election or after the date of the primary election if the person appears as a candidate on a primary election ballot and is not nominated at the primary election.

(2) This section does not apply to use of public funds for the cost of the following, when not done for a political purpose:

(a) Answers to communications of constituents.

(c) Actions taken by a state or local government administrative officer pursuant to a specific law, ordinance or resolution which authorizes or directs the actions to be taken.

(d) Communications not exceeding 500 pieces by members of the legislature relating solely to the subject matter of a special session or extraordinary session, made during the period between the date that the session is called or scheduled and 14 days after adjournment of the session.

(3) Except as provided in sub. (2), it is not a defense to a violation of sub. (1) that a person was not acting with a political purpose. This subsection applies irrespective of the distributor's intentions as to political office, the content of the materials, the manner of distribution, the pattern and frequency of distribution and the value of the distributed materials.

This section of the statutes has been interpreted by the Elections Board to apply to both legislative newsletters and other state publications. In addition, Section 11.33 makes it illegal to not only distribute literature, but also to purchase materials for distribution with state moneys. This has the practical effect of disallowing representatives from using office funds to purchase state highway maps, brochures, Capitol Guide books, How a Bill Becomes a Law, etc., (over 49 pieces total) for distribution in any manner after the first day authorized by law for circulation of nomination papers. Please keep this in mind when ordering any publications through the Chief Clerk's office after the first day for circulation of nomination papers.

Charles R. Sanders

Assembly Chief Clerk

TO: All State Legislators and Staff

FROM: CHARLES R. SANDERS
Assembly Chief Clerk

DATE: May 19, 1998

RE: USE OF GOVERNMENT MATERIALS BY CANDIDATES AFTER THE FIRST DAY FOR CIRCULATION OF NOMINATION PAPERS (JUNE 1, 1998)

Section 11.33 of the Wisconsin Statutes states as follows:

(1) (a) No person elected to state or local office who becomes a candidate for national, state or local office may use public funds for the cost of materials or distribution for 50 or more pieces of substantially identical material distributed after:

(1) In the case of a candidate who is nominated by nomination papers, the first day authorized by law for circulation of nomination papers as a candidate.

(b) This subsection applies until after the date of the election or after the date of the primary election if the person appears as a candidate on a primary election ballot and is not nominated at the primary election.

(2) This section does not apply to use of public funds for the cost of the following, when not done for a political purpose:

(a) Answers to communications of constituents.

(c) Actions taken by a state or local government administrative officer pursuant to a specific law, ordinance or resolution which authorizes or directs the actions to be taken.

(d) Communications not exceeding 500 pieces by members of the legislature relating solely to the subject matter of a special session or extraordinary session, made during the period between the date that the session is called or scheduled and 14 days after adjournment of the session.

(3) Except as provided in sub. (2), it is not a defense to a violation of sub. (1) that a person was not acting with a political purpose. This subsection applies irrespective of the distributor's intentions as to political office, the content of the materials, the manner of distribution, the pattern and frequency of distribution and the value of the distributed materials.

This section of the statutes has been interpreted by the Elections Board to apply to both legislative newsletters and other state publications. In addition, Section 11.33 makes it illegal to not only distribute literature, but also to purchase materials for distribution with state moneys. This has the practical effect of disallowing representatives from using office funds to purchase state highway maps, brochures, Capitol Guide books, How a Bill Becomes a Law, etc., (over 49 pieces total) for distribution in any manner after the first day authorized by law for circulation of nomination papers. Please keep this in mind when ordering any publications through the Chief Clerk's office after the first day for circulation of nomination papers.

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Charles R. Sanders

Assembly Chief Clerk

TO: Rep. Underheim

FROM: CHARLES R. SANDERS
Assembly Chief Clerk

DATE: January 17, 1997

RE: Use of Government Materials by Candidates
Please be careful, it's rough out there

Section 11.33 of the Wisconsin Statutes states as follows:

(1) (a) No person elected to state or local office who becomes a candidate for national, state or local office may use public funds for the cost of materials or distribution for 50 or more pieces of substantially identical material distributed after:

1. In the case of a candidate who is nominated by nomination papers, the first day authorized by law for circulation of nomination papers as a candidate.

(b) This subsection applies until after the date of the election or after the date of the primary election if the person appears as a candidate on a primary election ballot and is not nominated at the primary election.

(2) This section does not apply to use of public funds for the cost of the following, when not done for a political purpose:

(a) Answers to communications of constituents.

(c) Actions taken by a state or local government administrative officer pursuant to a specific law, ordinance or resolution which authorizes or directs the actions to be taken.

(d) Communications not exceeding 500 pieces by members of the legislature relating solely to the subject matter of a special session or extraordinary session, made during the period between the date that the session is called or scheduled and 14 days after adjournment of the session.

(3) Except as provided in sub. (2), it is not a defense to a violation of sub. (1) that a person was not acting with a political purpose. This subsection applies irrespective of the distributor's intentions as to political office, the content of the materials, the manner of distribution, the pattern and frequency of distribution and the value of the distributed materials.

This section of the statutes has been interpreted by the Elections board to apply to both legislative newsletters and other state publications. In addition, Section 11.33 makes it illegal to not only distribute literature, but also to purchase materials for distribution with state moneys. This has the practical effect of disallowing representatives from using office funds to purchase state highways maps, brochures, Capitol Guide books, How a Bill Becomes a Law, etc., (over 49 pieces total) for distribution in any manner after circulation of nomination papers begins. Please keep this in mind when ordering any publications through the Chief Clerk's office after the first day for circulation of nomination papers.

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Charles R. Sanders

Assembly Chief Clerk

TO: Candidates for Re-Election

FROM: CHARLES R. SANDERS
Assembly Chief Clerk

DATE: April 12, 1996

RE: Use of Government Materials by Candidates

Section 11.33 of the Wisconsin Statutes states as follows:

(1) (a) No person elected to state or local office who becomes a candidate for national, state or local office may use public funds for the cost of materials or distribution for 50 or more pieces of substantially identical material distributed after:

1. In the case of a candidate who is nominated by nomination papers, the first day authorized by law for circulation of nomination papers as a candidate.

(b) This subsection applies until after the date of the election or after the date of the primary election if the person appears as a candidate on a primary election ballot and is not nominated at the primary election.

(2) This section does not apply to use of public funds for the cost of the following, when not done for a political purpose:

(a) Answers to communications of constituents.

(c) Actions taken by a state or local government administrative officer pursuant to a specific law, ordinance or resolution which authorizes or directs the actions to be taken.

(d) Communications not exceeding 500 pieces by members of the legislature relating solely to the subject matter of a special session or extraordinary session, made during the period between the date that the session is called or scheduled and 14 days after adjournment of the session.

(3) Except as provided in sub. (2), it is not a defense to a violation of sub. (1) that a person was not acting with a political purpose. This subsection applies irrespective of the distributor's intentions as to political office, the content of the materials, the manner of distribution, the pattern and frequency of distribution and the value of the distributed materials.

This section of the statutes has been interpreted by the Elections board to apply to both legislative newsletters and other state publications. In addition, Section 11.33 makes it illegal to not only distribute literature, but also to purchase materials for distribution with state moneys. This has the practical effect of disallowing representatives from using office funds to purchase state highways maps, brochures, Capitol Guide books, How a Bill Becomes a Law, etc., (over 49 pieces total) for distribution in any manner after circulation of nomination papers begins. Please keep this in mind when ordering any publications through the Chief Clerk's office after the first day for circulation of nomination papers.

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STATE OF WISCONSIN
ETHICS BOARD

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MADISON, WISCONSIN 53703-2800
phone: 608/266-8123
fax: 608/264-9319
ethics@ethics.state.wi.us
http://ethics.state.wi.us

Roth Judd
Director

CERTIFICATE

State of Wisconsin)
) ss.
County of Dane)

I, Jonathan Becker, Legal Counsel to the State of Wisconsin Ethics Board, hereby certify that the annexed document is a true and correct copy of Ethics Board opinion 2 Op. Eth. Bd. 41 (1978).

Jonathan Becker 10/15/04
Jonathan Becker Date
Legal Counsel
My commission is permanent

CAMPAIGN ACTIVITIES; LEGISLATIVE EMPLOYES; USE OF STATE'S TIME, FACILITIES, SUPPLIES AND SERVICES

A legislative employe should not engage in campaign activities (a) with the use of the state's facilities, supplies or services not generally available to all citizens, (b) during hours for which he or she is compensated for service to the State of Wisconsin, or at his or her office in the Capitol regardless whether the activity takes place during regular office hours. The employe should attempt to refer campaign related inquiries received at the Capitol to the legislator or the legislator's campaign committee. Eth. Bd. 138

27 July 1978

Facts

This opinion is based upon these understandings:

a. You are an employe of the Legislature included among those people identified as policy research personnel, administrative assistants to legislators, and research staff to legislative committees and party caucuses. You are a state public official.

b. Occasionally, people inquire of you about matters related more closely to the campaign activities of the legislator for whom you work most closely than to the legislator's official functions. For example, people may ask you about a fund raiser or the manner in which they may assist in a legislator's campaign for re-election.

c. In the course of your official duties you provide a legislator with information concerning legislation, and you recognize that this information may often be useful to the legislator in connection with his or her campaign for re-election.

Question

The Ethics Board understands your question to be:

How, consistent with Wisconsin's Code of Ethics for Public Officials, can you assist the legislator for whom you work, in his or her re-election campaign?

Discussion

In our reply we shall refer to "campaign activity" or "campaign purpose." We prefer these terms to "political activity" because "political" often embraces a wide variety of actions pertaining to the affairs of government in which a state official or employe might properly engage in the exercise of his or her official functions. By "campaign activity" we mean an activity arising independently of official functions and a substantial effect or purpose of which is to influence the voting at any election (other than a referendum) or to promote or to discourage support of anyone's present or future candidacy for election to public office.

In general, we think you should not engage in campaign activity:

(a) with the use of the state's supplies, services or facilities not available to all citizens,

(b) during hours for which you are compensated by the State of Wisconsin, or

(c) at your office in the capitol regardless whether the activity takes place during regular office hours.

For example, you should not write or call an organization (including labor, business, or civic association) to request the legislator's appearance at a campaign activity or assist in renting a hall, ordering supplies, or addressing invitations for a campaign activity. Moreover, you should not solicit contributions of money, supplies, facilities, or services for a campaign purpose or invite people to attend a campaign activity under the circumstances described above. Although you should not participate in the preparation or presentation of any speech or brochure to be used primarily for campaign activities, we recognize that your preparation of information for a legislator is a part of your job. Insofar as your activities arise because of your official functions and not independently of them, we are unaware of any impropriety.

You should not use the state's telephone equipment for campaign activities whether the telephone call is initiated or received, long distance or local. Nevertheless, we recognize that you are likely to receive some inquiries related to campaign activities by telephone and in person. If these inquiries are infrequent and not encouraged by you or the legislator for whom you work or the campaign committee, we do not consider your handling them at your office a violation of the Ethics Code. However, we do suggest you always bear in mind your responsibilities as a state employe in this regard and attempt to refer the call or visitor to the legislator or a representative of the campaign committee.

Because we think that you can better comply, in fact and in appearance, with our advice if you are not intimately associated with the legislator's campaign committee we recommend that you not hold any official position in the legislator's campaign committee.

In general, however, we think there is no impropriety associated with your undertaking campaign activities during hours for which you are not compensated by the State of Wisconsin and or or with property neither owned nor leased by the State of Wisconsin. For example, we think it is entirely appropriate that you make campaign contributions, attend fund raisers for candidates for election to public office, prepare speeches and campaign materials, and participate in political organizations and committees as long as you do those things without use of the state's time, facilities, supplies and services not readily available to all citizens of Wisconsin.

Advice

The State of Wisconsin Ethics Board advises you that you should not engage in campaign activities (a) with the use of the state's supplies, services or facilities not generally available to all citizens, (b) during hours for which you are compensated by the State of Wisconsin, or (c) at your office in the Capitol regardless whether the activity takes place during regular office hours. Moreover, you should attempt to refer campaign related inquiries received at your office to the legislator or legislator's campaign committee.

State of Wisconsin

Standards of Conduct

for State Public Officials, Lobbyists, and Lobbyists' Employers

A STATE PUBLIC OFFICIAL SHOULD NOT:

ACT OFFICIALLY IN A MATTER IN WHICH PRIVATELY INTERESTED. Take any official action in a matter in which (a) the official's action or inaction could reasonably be expected to produce a substantial benefit for the official, a member of his or her immediate family, or an organization with which the official is associated or (b) the official in his or her private capacity, or a member of his or her immediate family, or an organization with which the official is associated has a substantial interest. [§19.46, *Wisconsin Statutes*]

USE PUBLIC POSITION FOR PRIVATE BENEFIT. Use his or her public position to obtain financial gain or anything of substantial value for the public official, a member of his or her immediate family, or an organization with which he or she is associated. [§19.45(2)]

ACCEPT TRANSPORTATION, LODGING, FOOD, OR BEVERAGE EXCEPT AS SPECIFICALLY AUTHORIZED. Accept or retain transportation, lodging, meals, food or beverage except (a) payment of expenses for talks and meetings about state government, (b) items and services offered for reasons unrelated to public office, as long as not furnished by a lobbyist or by a lobbyist's employer, (c) items provided by or to the state, or (d) from a campaign committee under chapter 11. [§19.45(3m)]

SOLICIT OR ACCEPT REWARDS OR ITEMS OR SERVICES LIKELY TO INFLUENCE. Solicit or accept, directly or indirectly, anything of value if it could reasonably be expected to influence an official's action or inaction or could reasonably be considered as a reward for any action or inaction. [§19.45(3)]

USE CONFIDENTIAL INFORMATION. Intentionally use or disclose confidential information which could result in the receipt of anything of value. [§19.45(4)]

USE PUBLIC POSITION TO OBTAIN UNLAWFUL BENEFITS. Use or attempt to use his or her public position to influence or gain, for anyone, unlawful benefits, advantages or privileges. [§19.45(5)]

ENTER INTO PUBLIC CONTRACTS WITHOUT NOTICE. Enter into a contract or lease involving the payment of more than $3,000 in a 12-month period, in whole or in part derived from state funds, unless written disclosure is made to the Ethics Board and applicable state agency. This prohibition extends also to any organization in which the official has a 10% or greater interest. [§19.45(6)]

CHARGE A FEE TO REPRESENT A PERSON BEFORE A STATE AGENCY. Represent a person or organization for pay before a state agency, except in nondiscretionary matters, at open hearings at which stenographic records are kept, in contested cases which involve parties other than the state with interests adverse to those represented by the state public official, or in matters before the Department of Revenue or the Tax Appeals Commission in connection with a client's tax matter. This restraint does not apply to unsalaried public officials. [§19.45(7)]

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Obtain revised version after January 1, 1996.

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AN ELECTIVE STATE OFFICIAL, AN AGENCY OFFICIAL, A LEGISLATIVE EMPLOYEE, OR CANDIDATE FOR ELECTIVE STATE OFFICE SHOULD NOT:

ACCEPT ANYTHING OF PECUNIARY VALUE FROM A LOBBYIST OR FROM A LOBBYIST'S EMPLOYER. Normally solicit or accept anything of pecuniary value from a lobbyist or from an organization that employs a lobbyist. [§13.625(3)]

A LOBBYIST SHOULD NOT:

FURNISH ANYTHING OF PECUNIARY VALUE TO A STATE OFFICIAL. Furnish anything of pecuniary value to an elective state official, agency official, legislative employee, or candidate for elective office. [§13.625(1)(b)]

INSTIGATE LEGISLATION. Instigate legislative or administrative action for the purpose of obtaining employment in support or opposition thereto. [§13.625(1)(a)]

MAKE COMPENSATION CONTINGENT ON LEGISLATIVE ACTION. Contract to receive compensation dependent in any manner upon the success or failure of any legislative or administrative action. [§13.625(1)(d)]

MAKE CERTAIN CAMPAIGN CONTRIBUTIONS EXCEPT DURING PRESCRIBED PERIOD. Contribute to the campaign of a partisan elected state official or candidate for partisan elective state office, except between June 1 and the day of the general election in even-numbered years and, even then, to a candidate for the legislature only if the legislature is not in session. [§13.625(1)(c)]

A LOBBYIST'S EMPLOYER SHOULD NOT:

FURNISH ANYTHING OF PECUNIARY VALUE TO A STATE OFFICIAL. Furnish anything of pecuniary value to an elective state official, agency official, legislative employee, or candidate for elective office. [§13.625(1)(b) and (2)]

MAKE CERTAIN CAMPAIGN CONTRIBUTIONS EXCEPT DURING PRESCRIBED PERIOD. Contribute to the campaign of a partisan elected state official or candidate for partisan elective state office, except between June 1 and the day of the general election in even-numbered years and, even then, to a candidate for the legislature only if the legislature is not in session. [§13.625(1)(c) and (2)]

A FORMER STATE PUBLIC OFFICIAL (OTHER THAN A LEGISLATOR OR LEGISLATIVE EMPLOYEE) SHOULD NOT:

COMMUNICATE WITH FORMER AGENCY FOR 12 MONTHS AS PAID REPRESENTATIVE. Represent his or her private employer (a) before his or her former agency within 12 months after leaving the agency or (b) in any matter in which the individual was personally and substantially involved as a state public official. [§19.45(8)]

For state public officials

Solicitation of Items or Services

Limitations on solicitation

A state public official **may not use his or her public position,** including the title or prestige of his or her public position, to obtain anything of more than insubstantial value for the private benefit of the official, for the official's spouse or legal dependent, or for an organization of which the official is an officer or director or is otherwise associated as an authorized representative or in which the official has a 10% or greater ownership interest. [§ 19.45(2), *Wisconsin Statutes*]

A state public official may not solicit anything of value

(even for a charity, a governmental program, an unaffiliated organization, or unrelated person and even if the solicitation is independent of and unrelated to holding a public position)

EITHER

from a **lobbyist** or from an **organization that employs a lobbyist*** [§13.625(3), *Wis. Stats.*]

OR

from anyone if either the contribution or the failure to contribute could reasonably be:

- **Expected to influence** the official's vote, official action, or judgment OR
- **Considered a reward** for any official action or inaction on the part of the state public official. [§ 19.45(3), *Wisconsin Statutes*]

Solutions for instances when solicitation is not permitted

ACTIONS IN OFFICIAL CAPACITY -- GOVERNMENT-RELATED EVENTS FOR WHICH PRIVATE SUPPORT IS WELCOME: Because a state official should not solicit a significant contribution from a person or an organization with a special interest in the actions of the public body with which the official is affiliated, a state agency desiring private support for a government-related activity should, instead of soliciting contributions, rely on the assistance volunteered by a national association with which the agency is affiliated or by a chamber of commerce, visitors and convention bureau, or the like.

ACTIONS IN PRIVATE CAPACITY: Although a state official should not solicit a significant contribution from a person or an organization with a special interest in the actions of the public body with which the official is affiliated, an official affiliated with a private organization usually does not misuse the title or prestige of his or her office by permitting identification of his or her public office on a letter in the same style and prominence in which other representatives of the private organization are identified.

"Anything of value" means any money or property, favor, service, payment, advance, forbearance, loan, or promise of future employment, but does not include compensation and expenses paid by the state, fees, honoraria and expenses which are expressly permitted in connection with the presentation of a talk or participation in a meeting and reported to the Ethics Board, **campaign contributions** which are permitted and reported to the Elections Board, or hospitality extended for a purpose unrelated to state business by a person other than an organization. [§ 19.42(1)]

"Expected to influence" It would be unreasonable to expect a contribution of not more than $25 to influence an official's judgment. It would be unreasonable to expect a contribution from an individual or from an organization without any special interest in the actions of a public body to influence an official affiliated with that body.

"Considered a reward" Something is reasonably considered a reward if it is given or received for past behavior.

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* Unless the official is not an elected official or legislative employee and the official's responsibilities do not include participation in the proposal, drafting, development, consideration, promulgation, amendment, repeal, or rejection of administrative rules.

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For state public officials

Telephone Calls

It is improper and illegal for a state public official to charge the State of Wisconsin for a telephone call if the call is not primarily related to the person's official responsibility--even if the official later reimburses the State for its costs.

If a telephone call is related primarily to official business, it is appropriately paid by the State of Wisconsin. If a telephone call is primarily personal, the call should not be billed to the State of Wisconsin, even if some official activities are discussed in the course of the conversation.

The identification of telephone calls properly paid by the State of Wisconsin requires the exercise of judgment--judgment most appropriately exercised and responsibility most appropriately borne by the official making or authorizing the telephone call.

CALL PROPERLY PAID BY THE STATE:

Although a state public official's purpose determines whether his or her telephone call should be billed to the State of Wisconsin, telephone calls of the types described below are usually properly paid by the State:

1. A telephone call between a state public official and his or her government office.

   E.g.: A vacationing official calls his or her government office.

   A legislator's aide calls the legislator at the legislator's home or place of private employment.

2. A telephone call between a state public official and the official's home or place of private employment at which the official regularly receives messages related to his or her official duties.

   E.g.: A state public official publishes his or her home telephone number on official stationery and uses the home as an extension of his or her government office.

3. A telephone call made by a state public official required to be away from home on official business because the official's schedule is changed abruptly.

   E.g.: An official at an out-of-state conference or a legislator at the Capitol calls home because his or her schedule has been changed abruptly.

4. A state public official's telephone call to a representative of the press.

See other side ☞

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CALLS USUALLY PAID BY INDIVIDUAL

Telephone calls described below are of types likely to be made to further a personal interest. If a state public official makes one of these calls, he or she should be certain that it arises because of official functions before billing it to Wisconsin's taxpayers:

1. A telephone call made to any political campaign headquarters or political committee.

2. A telephone call made by a state public official to a relative, business associate, or personal friend or to the official's place of private employment.

3. A telephone call made by a full-time, salaried, appointed state public official from his or her government office to his or her home.

Although an official receiving a message to return a telephone call is sometimes unable to know the call's purpose, the Ethics Board's suggestions apply to calls returned as well as to calls initiated by a state public official.

THE TEST IS WHETHER THE TELEPHONE CALL ARISES INDEPENDENTLY OF OFFICIAL FUNCTIONS OR BECAUSE OF THEM.

IN THE SUPREME COURT
STATE OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs. Appeal No. 03-0106-CR

SCOTT R. JENSEN, STEVEN M. FOTI
and SHERRY L. SCHULTZ,

Defendants-Appellants-Petitioners.

APPEAL FROM THE DECISION OF THE COURT OF APPEALS, DISTRICT IV ENTERED ON APRIL 1, 2004, AFFIRMING DECISION AND ORDER ENTERED IN DANE COUNTY CIRCUIT COURT ON JANUARY 10, 2003, THE HONORABLE DANIEL R. MOESER, PRESIDING

REPLY BRIEF OF DEFENDANTS-APPELLANTS-PETITIONERS SCOTT R. JENSEN, STEVEN M. FOTI AND SHERRY L. SCHULTZ

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INTRODUCTION

A perception exists in the minds of the public, no doubt fostered by the state's prosecution as well as the media, that appellants are nothing more than three more corrupt politicians trying to avoid criminal prosecution based on a "technicality." Appellants submit to this Court that requiring a clear and definitive legislative statement of what constitutes the "duties" giving rise to felony prosecution for misconduct in public office is a far cry from a technicality. Appellants do not ask this Court to insulate corrupt behavior from prosecution. They do not seek special treatment because of their positions. Instead, they seek a determination that § 946.12, Wis. Stats., is constitutionally defective when applied to these appellants because it fails to clearly and sufficiently define the "duties" of a legislator and legislative aide that, when violated, give rise to felony criminal prosecution and of up to five years in prison.

The state's early response to this argument was that it was up to the courts to "fill in the blank" to determine the duties of individuals charged with violating § 946.12. The state has now refined its position by selecting memos, emails and other non-statutory sources to define these duties. Appellants do not doubt

that the defects of this statute can be remedied, but not by this Court or the district attorney, and certainly not by the adoption of definitions of "duties" from sources that clearly never intended their definitions to give rise to felony criminal prosecution. It is up to the Wisconsin Legislature to delineate the very specific conduct giving rise to prosecution for felony misconduct in public office.

This case involves a clash between the executive branch, represented by the prosecutors, and members of the legislative branch including two legislators and one of their employees. The Court accepted review to provide guidance not only to these parties in connection with the challenge to the criminal statute, but also for future situations where employees, legislators and prosecutors try to determine if certain conduct, in the political arena that is called the legislative branch of government, is in violation of a duty included in § 946.12 (3).

There is no disagreement by the parties on this appeal that the criminal statute at issue neither defines nor provides a list of those duties that are prohibited or are mandated for a legislator or an employee to follow. The state makes a major concession, as it must,

by agreeing there is no statute in any chapter of the Wisconsin Statutes setting forth the duty. As the state has said:

- " . . . just as [Wisconsin] lacks a statute expressly stating 'the use of state resources for private campaigns is prohibited.'" (SB.11)[1].
- "While no one statute contains an express statement using the words 'conducting political campaigns on state time is prohibited' . . . ." (SB.22).
- " . . . just as [Wisconsin] lacks a statute expressly prohibiting 'use of state resources for private campaigns.'" (SBCA.12).
- "While neither of these statutes [19.46 and 19.45], nor any others in Chapters 11, 12 or 19 state that 'conducting political campaigns on state time is prohibited' . . ." (SBCA.19).
- " . . . simply because no authority specifically holds that provisions in Chapters 11, 12, and 19 inform the duties of a public official under Section 946.12(3) does not mean they do not do so." (SBCA.26).

There also is no Wisconsin case law addressing the duties and the state concedes this fact as well by failing to cite to any case. The

clearest case addressing a political arena was issued by the highest court in New York and the state, while recognizing the intermediate New York court's opinion, fails to address the high court opinion. *See People v. Ohrenstein*, 77 N.Y.2d 38 (1990). Further, there are no administrative code sections expressing a duty for a legislator or an employee to avoid political activity on state property or state time.

While this lack of statutory and case law authority should end any further argument, the state continues to attempt to justify this prosecution, resulting in a series of constantly shifting arguments by the state as to what is the appropriate source to determine the appellants' duties. The court of appeals agreed that a trial court, or even the prosecution, could cobble together a definition of "duties" in order to justify this prosecution. These sources have ranged from emails and memos to a mosaic reading of Chapters 11, 12 and 19, Wis. Stats., to a common law fiduciary duty. (AB.10-11, 15-16, SBCA.13-15, SB.19-20). Like a drowning man struggling to stay afloat, the state continues to grasp at ever-changing theories to support its prosecution. The state's concessions and ever-changing

[1] "SB" refers to the state's response brief. "AB" refers to appellants' initial brief. "SBCA" refers to the state's response brief submitted to the court of appeals.

theories of liability demonstrate the vagueness of the statute as applied.

Still, the problems for the state do not end here. The state has also failed to identify or cite authority, which would give guidance to the parties and the trial court as to how to differentiate, if it were at all possible, between "legislative activity" and "political activity" and "campaign activity." Without any concrete definitions for these terms, the state's argument goes nowhere. These problems are compounded by the fact that by this prosecution the state attempts to apply a criminal statute to activity that directly implicates the First Amendment and has attempted to invade core powers reserved to a coequal branch of government. Simply put, the state has no lifevest to save this prosecution.

I. THE STATUTORY INTERPRETATION ADVOCATED BY THE STATE DEMONSTRATES THAT SECTION 946.12(3) IS VAGUE AS APPLIED.

A. The Statutes Do Not Define The Duties Of A Legislator Or Legislative Aide.

Although the state agrees this case involves a "factually unique setting,"[2] it asserts that a statute requiring interpretation is

[2] State's Motion for Enlargement, 09/13/04, ¶ 2.

not vague, citing *State v. Hahn,* 221 Wis. 2d 670, 677, 586 N.W.2d 5 (Ct. App. 1998). There is a vast difference, however, between interpreting a statute and rewriting it to accommodate a novel interpretation. Indeed, the United States Supreme Court has recognized this difference:

> [A]lthough clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, . . . ***due process bars courts from applying a novel construction of a criminal statute to conduct that neither the state nor any prior judicial decision has fairly disclosed to be within its scope . . .***

United States v. Lanier, 520 U.S. 259, 266 (1997) (emphasis added).

The state argues that the term "duties" need not "be explicitly identified in a particular statute," (SB.10), because the misconduct statute, by itself, prohibits conduct that does not violate any other statute. (SB.9). In other words, the state asserts that "duties" can remain undefined by the statutes and a prosecutor can search through emails, handbooks and ethics opinions to define the violation. This interpretation illustrates the problem at the heart of the vagueness issue: the absence of a definition of "duties" allows the prosecutor to define what constitutes a violation of § 946.12 (3), rendering the statute vague under the second prong of *State v.*

Pittman, 174 Wis. 2d 255, 276, 496 N.W.2d 74, *cert. denied,* 510 U.S. 845 (1993).

Moreover, a prosecutor cannot impute possible ethical violations as synonymous with criminal conduct. In *State v. Serstock,* 402 N.W.2d 514, 516-517 (Minn. 1987), the Minnesota Supreme Court rejected a prosecution argument that the court could turn to a City Ethics Code or the Minnesota Code of Professional Responsibility to define the term "lawful authority" in interpreting Minnesota's misconduct in public office statute because (1) neither code was intended to define "lawful authority" for purposes of the criminal statute, and (2) adopting the definitions set forth in the codes would improperly extend those provisions beyond their intended purpose. *Id.* The court held that what constitutes "lawful authority" must be determined by statutes which define or describe a public official's authority. *Id.*

The *Serstock* court relied in part on a Delaware decision discussing that state's misconduct in public office statute which "bars a public servant from knowingly refraining from performing a duty 'clearly inherent in the nature of his office.'" The Delaware court stated:

> The meaning of the phrase does not include the duty of avoiding violation of unspecified conflict-of-interest or other ethical standards. Such an interpretation would defeat the legislative policy that officers and employees of the State must have the benefit of specific standards to guide their conduct and should be subject to criminal penalties only for violation of those standards that are found to be especially vital to government. Specification of such ethical standards and appropriate sanctions for their violation is a legislative function, not one to be performed by a court in a prosecution for official misconduct.

Id. at 517 (quoting *State v. Green,* 376 A.2d 424, 428 (Del. Super. Ct. 1977)).

Similarly, this court should not consider the adoption of emails, memos from other legislators or ethics opinions to establish the definition of "duties" in § 946.12. Like public officials in Minnesota and Delaware, appellants and all other public officials in Wisconsin should have the benefit of specific standards to guide their conduct -- standards established not by courts in the midst of a criminal prosecution, but by the legislature. *Id.*

It should be concluded that the state's brief inadvertently supports this analysis. The state recognizes and agrees that there are statutes that set forth some specific duties for particular officials. The state attempts to distinguish those statutes, arguing they did not

provide an exhaustive list of those officials' duties and could not "seriously be argued to be the only duties those officials have." (SB.9). Legislators have a myriad of duties and some are inconsistent with others. This is part of the fundamental nature of the political branch of government. The key point is, before a prosecutor initiates a criminal prosecution that has as an element a requirement that the state prove that an individual acted "inconsistent with the duties" of his office, these duties should be expressly and clearly articulated in a statute.

Finally, the state's attempt to compare § 946.12 (3) with other statutes that have been challenged as vague misses the point. This case is not a simple matter of interpreting or defining otherwise unambiguous statutory terms. The term "duties" is unclear on multiple fronts. For example, to whom are a legislator's duties owed? A legislator and his aides have duties to many different people -- the constituents who voted for him, the constituents who did not vote for him, his political party, the general public and the "public good." Moreover, what exactly are the duties of a legislative office? Does a legislative leader not have additional duties beyond a general member? Logically, if duties are derived from multiple

sources, there will be conflicting duties that will subject a legislator to a charge of acting inconsistently with the duties of his office.

B. Legislative Intent.

The state's argument as to legislative intent is confusing at best. First, it argues that § 946.12 (3) is worded differently than other subsections of the misconduct statute and thus represents an intent by the legislature to reach different types of conduct. (SB.9). However, the state also urges the court to adopt the comments made in 1953 by the Wisconsin Legislative Council to § 946.12 (1) as an aid in interpreting § 946.12 (3). (SB.14). The state then reverses direction once again by arguing that the preeminent case interpreting § 946.12 (1), *State v. Dekker*, 112 Wis. 2d 304, 332 N.W.2d 816 (Ct. App. 1983), is inapplicable because it interprets subsection (1) rather than subsection (3) of the statute. (SB.34). Do the principles developed under § 946.12 (1) apply to § 946.12 (3) or not? If the state cannot answer this question, how can the state conclude the statute is not unconstitutionally vague?

Intertwined with its vacillation over the nonapplicability of subsection (1) is the state's failure to respond in any meaningful fashion to the appellants' argument that Wis. JI-Criminal 1732 and

State v. Genova, 77 Wis. 2d 141, 252 N.W.2d 380 (1977), provide assistance in construing § 946.12 (3). (SB.13, AB.26-27). In *Genova,* the issue before the court was an interpretation of the theft statute, § 943.20. In interpreting that statute, the court sought guidance and relied in part upon the theft jury instruction, Wis. JI-Criminal 1441. The instruction committee members who drafted the instruction were the same committee members who drafted the instruction for misconduct in public office under § 946.12 (3), Wis. JI-Criminal 1732. As pointed out by Professor Remington in his amicus brief in *Genova,* "[i]t seems perfectly obvious the jury instruction committee would not have proposed the theft instruction unless the four former members of the Criminal Code Advisory Committee agreed that the instruction properly construed the purpose of the Criminal Code Advisory Committee and of the draftsmen." *Genova,* 77 Wis. 2d at 150-51.

Likewise, the jury instruction committee would not have proposed the misconduct of public office instruction unless the four former members of the Criminal Code Advisory Committee agreed that the instruction properly construed the purpose of the Criminal Code Advisory Committee and of the draftsmen. In other words, it

was the intent of the drafters of § 946.12 (3), Wis. Stats., that the element of "duties" be defined by direct reference to an explicit statute defining the duties of the public official in question.

C. "Common Law Fiduciary Duties."

In arguments raised for the first time on appeal and in a final attempt to salvage this prosecution at the appellate level, the state argues that appellants had common law fiduciary duties "to refrain from using taxpayer dollars to run private political campaigns." (SB.19-22). First, in Wisconsin, "crimes are exclusively statutory, the task of defining criminal conduct is entirely within the legislative domain." *State v. Baldwin,* 101 Wis. 2d 441, 446, 304 N.W.2d 742 (1981). Wisconsin courts "must look to the legislature's definition of a crime in construing a statute and not the common law definition." *State v. Genova,* 77 Wis. 2d at 145. Under these principles, the state cannot use common law fiduciary duties to establish an element of or to prove a violation of § 946.12 (3). Second, despite its best efforts, the state cites no statutory or case law authority discussing a specific fiduciary duty that requires a legislator to refrain from using taxpayer dollars for campaign purposes.

The prosecution's theory that a common law general fiduciary duty exists between the taxpayers of this state and a particular member of the legislature, a breach of which is actionable in a civil or criminal context, apparently is based on a master/servant theory. The state relies upon *Milwaukee v. Drew*, 220 Wis. 511, 265 N.W. 683 (1936) and *State v. Schwarze*, 120 Wis. 2d 453, 355 N.W.2d 842 (Ct. App. 1984), to support this proposition. (SB.19-21). In *Drew*, the court allowed the City of Milwaukee to pursue a lawsuit against the estate of a former city treasurer who had retained profits from personally investing funds that belonged to the City of Milwaukee. Drew was an employee of a statutorily recognized entity, the City of Milwaukee. His position with the city was governed by statutorily defined duties. (City Treasurer, §62.09(9), *Stats.* 1929). Drew held a clear master/servant relationship with the City of Milwaukee.

In *State v. Schwarze*, the court determined that a school district clerk had a duty under § 946.12 (3) to disclose to her employer her brother's theft of $10,000 from her desk,[3] citing master/servant and agency principles. Similar to Drew, Schwarze was an employee of a statutorily recognized entity, the Watertown Unified School District,

and held a position whose duties were statutorily defined. (§ 120.16, Wis. Stats.).

Here, there is no statutorily-defined master/servant relationship. Moreover, in *Schwarze* the parties did not raise and the decision does not analyze § 946.12 (3) in the context of its constitutionality, the vagueness of "duties" or established law which forbids a court from creating a common law definition of a crime. *Drew* and *Schwarze* simply do not apply here.

The prospective application of the state's interpretation of § 946.12 is chilling. Legislative activity could come to a complete halt if legislators are deemed to owe a fiduciary duty to taxpayers that is actionable by civil suit or criminal prosecution. Certainly no legislator voting on a budget bill to spend taxpayer funds acts consistently with the wishes and desires of all constituents or the majority of state taxpayers. What legislator would promote or authorize the spending of any money knowing that he or she may be subject to suit or, worse, criminal prosecution, by a disgruntled taxpayer?

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[3] Unlike appellants here, Schwarze also was charged with (and acquitted of) felony theft.

D. Common Law Fiduciary Duty -- Outside Jurisdictions.

The state continues its attempt to argue to this court that other jurisdictions have allowed criminal prosecutions based upon an official's breach of one's fiduciary duty to the public. A brief examination of those cases reveals the fallacy of this assertion. In *People v. Scharlau,* 565 N.E.2d 1319 (Ill. 1990), the Illinois Supreme Court allowed a criminal prosecution based not on some recognized common law fiduciary duty, as argued by the state, but instead upon a finding that the defendants had exceeded their lawful authority (an element required by the Illinois misconduct statute) by violating two specific statutes detailing the requirements of the office. *Scharlau,* 565 N.E.2d at 1325-27.

The New Jersey cases are inapplicable as well. First, it should be noted that New Jersey abolished common law crimes in 1979. N.J.S.A. §2C:1-5. Prior to that date, misconduct in public office was a common law crime. Two of the cases cited by the state were decided prior to this abolition. *State v. Welek,* 91 A.2d 751 (N.J. 1952); *State v. Deegan,* 315 A.2d 686 (N.J. Super. 1974). In 1979, New Jersey enacted a statute defining official misconduct. N.J.S.A §30-2. Aside

from the obvious point that this current statute is significantly different than § 946.12 (3), the facts underlying *State v. Parker,* 592 A.2d 228 (N.J. 1991), are revealing. In *Parker,* a schoolteacher was charged with official misconduct and with ten counts of either sexual assault or crimes against children for a continuing course of conduct. The charge of official misconduct was based on the underlying criminal acts of sexual assault. *Parker,* 592 A.2d at 230. The jury convicted the defendant of official misconduct, acquitted her of three counts of sexual assault but were unable to reach a verdict as to seven remaining counts. The focus of the appeal was on the question of jury unanimity and the split verdict. That aside, the underlying act constituting misconduct was clearly criminal in nature.

E. Chapters 11, 12 and 19, *Stats.*

The state devotes a substantial argument to its assertion that Chapters 11, 12 and 19 taken together create the duty it wishes to impose. (SB.22-28). Setting aside for a moment the state's concession that no statute contains the express prohibition against conducting political campaigns on state time using state resources, the state's argument is still without merit.

1. The dates of the various statutes are important.

The state intentionally avoids addressing the dates these statutes were enacted as the appellants discussed in their initial brief. Section 946.12(3) was enacted in 1955 and Chapters 11, 12 and 19 were enacted approximately twenty years later. Yet the state can cite no authority to support its argument that the legislature presumed Chapters 11, 12 and 19 would be incorporated into § 946.12 (3) without an expressed reference in either that statute or the new sections. To the contrary, the legislature's failure to build a bridge between the felony provisions of § 946.12 (3) and the campaign and finance laws, coupled with the fact that Chapters 11, 12 and 19 provide for their own sanctions, suggests a lack of intent to read these statutes together.

2. Policy statutes cannot be used for other purposes.

To the extent that the state relies on § 11.001, Declaration of Policy for Campaign Financing, and § 19.41, Declaration of Policy for the Ethics Code, the recent case of *State v. Powers*, 2004 WI. App. 156 is instructive. In *Powers*, the court of appeals authorized consultation with the State of Wisconsin Legislative Reference

Bureau's "Bill Drafting Manual" to see if it provides additional insight to the meaning of the language at issue. *Powers,* 2004 WI. App. ¶14. The Bill Drafting Manual cautions drafters from incorporating these types of statutes. In particular, the manual advises against including such a statute because a statement of intent or purpose may include provisions that could have unforeseen effects on other seemingly unrelated laws. LRB Bill Drafting Manual §7.11(d), (2005-2006).

3. No statutes define duties.

There is not one section in Chapters 11, 12 or 19 setting forth a prohibition or other duty regarding campaign or political activity as charged in this action. The state cites no such statute in its brief. These chapters simply do not form the basis of a duty for purposes of a criminal felony charge under § 946.12.

II. THE STATE HAS MISSTATED THE APPROPRIATE LEGAL STANDARDS TO BE USED IN DETERMINING THE CONSTITUTIONAL ISSUES PRESENTED.

A. Because the statute as applied infringes on the exercise of First Amendment rights, the burden of establishing its constitutionality is on the state.

The state does not challenge the appellants' position that the prosecution in this case directly implicates the First Amendment. (AB.37-39). "When a statute implicates First Amendment rights, the state has the burden of proving beyond a reasonable doubt that the statute is constitutional." *State v. Jadowski*, 2004 WI 68, ¶10, n.7, 272 Wis. 2d 411, 418, 680 N.W.2d 810. It makes no difference whether the challenge is based on vagueness or overbreadth. If the challenge to the statute is based on vagueness and the statute infringes on the exercise of First Amendment rights, the burden of proving the constitutionality of the statute lies with the state, not with the appellants. *City of Madison v. Baumann*, 162 Wis. 2d 660, 668, 470 N.W.2d 296 (1991).

This shifting of the burden of proof has also been characterized as "strict scrutiny." The United States Supreme Court has observed: "[t]he degree of vagueness that the Constitution tolerates -- as well as the relative importance of fair notice and fair enforcement -- depends in part on the nature of the enactment." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). Civil statutes or economic regulations are given greater tolerance in the degree of

vagueness than cases involving criminal penalties. *Village of Hoffman Estates,* 455 U.S. at 498-499. Moreover, the United States Supreme Court has repeatedly applied strict standards of permissible statutory vagueness to legislation in the area of First Amendment rights." 1 Wayne R. LaFave, *Substantive Criminal Law* §2.3(d) (2d ed. 2003). As the court eventually opined in *Village of Hoffman Estates,* "[i]f for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Village of Hoffman Estates,* 455 U.S. at 499.

What do these concepts of "strict scrutiny" or "burden of proof" mean in the context of this case? This is a criminal case implicating First Amendment rights and, two of the most important factors restricting the degree of vagueness that is constitutionally tolerated are present. In other words, § 946.12 (3), Wis. Stats., either should be clearly applicable to the appellants' alleged conduct or the prosecution should fail. Under this standard, the mere fact that there is no statute defining the duties of a legislator is fatal to the state in its effort to carry its burden.

B. Vagueness.

The state argues incorrectly that a party challenging a statute on vagueness grounds must establish both prongs of the vagueness test. (SB.6). Fundamentally, a person challenging the statute does not have to "first show" a lack of fair notice. (*Id.*) Appellants can prevail on a vagueness claim under *either* the fair notice prong *or* the arbitrary and discriminatory enforcement prong. This is exemplified by the Supreme Court decision in *Kolender v. Lawson,* 461 U.S. 356 (1983), where the court invalidated a California statute solely on the basis that the statute vested complete discretion in the hands of the police to determine whether a suspect has satisfied the statute. *Kolender,* 461 U.S. at 358. The court ignored the "fair notice" prong and focused entirely on the second-prong of the vagueness doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement. *Id.*

But it is the state that has the burden of proof to establish the constitutionality of the statute and not the appellants. *Baumann,* 162 Wis. 2d 668-69. The law requires the state to carry the burden as to *both* prongs. It has failed to meets its burden.

C. Separation of Powers.

The state begins its Separation of Powers argument by misstating the burden of proof. (SB.43). The state claims appellants must prove that charges under § 946.12 (3), Wis. Stats., violate the Separation of Powers by proof beyond a reasonable doubt, relying on *State v. Holmes*, 106 Wis. 2d 31, 315 N.W.2d 703 (1982). However, that case involved a claim that the statute itself, not the prosecutor's interpretation and application of the statute, was unconstitutional: "the burden of proving a statute unconstitutional beyond a reasonable doubt rests upon the party *attacking the statute.*" *Id.* at 41 (emphasis added). Appellants here challenge the prosecutor's *application* of § 946.12 (3) as a violation of the Separation of Powers; therefore, *Holmes* does not apply.

D. Standing to Challenge Vagueness.

Standing, in the context of a vagueness challenge, requires an assessment of whether the litigant's conduct is clearly proscribed by the statute because, if it is, the litigant cannot complain of the vagueness of the law as applied to others. *State ex rel. Smith v. Oak Creek*, 139 Wis. 2d 788, 802-803, 407 N.W.2d 901 (1987). "A person whose conduct falls squarely within the parameters of the

statute . . . has no standing to challenge the statute as either vague or ambiguous." 9 Wiseman, Chiarkas and Blinka, *Wisconsin Practice: Criminal Practice & Procedure*, §11.13 (1996).

Thus, the question here is whether appellants' conduct falls squarely within the parameters of the statute, that is, whether their conduct is clearly proscribed by § 946.12 (3), Wis. Stats. Resolving the standing issue does not call for a subjective evaluation of the appellants' state of mind, nor should it. Both prongs of the void for vagueness doctrine are articulated in objective terms.

Likewise, this case is different than *State v. Tronca*, 84 Wis. 2d 68, 267 N.W.2d 216 (1978). As appellants explained in their initial brief, the *Tronca* court rejected a vagueness claim challenging the term "discretionary power" contained in § 946.12 (3), stating the defendants there lacked standing because they were "aware of the *criminality* of [their] conduct *and the consequences.*" *Tronca*, 84 Wis. 2d at 87-88 (emphasis added). The court held § 946.12 (3) "clearly gives notice of the nature of the penalties and the applicability of the statute *to the conduct engaged in by each of the defendants.*" *Tronca*, 84 Wis. 2d. at 87 (emphasis added).

The criminal complaint here does not establish appellants' awareness of the "criminality" of their alleged conduct or that their conduct would subject them to felony criminal sanctions. There is a vast difference between accepting bribes in exchange for votes -- conduct clearly proscribed under the criminal bribery statutes -- and the conduct alleged here, which the state has repeatedly conceded is not expressly prohibited by any statute. Moreover, a prosecutor cannot impute possible ethical violations as synonymous with criminal conduct.

None of the emails, memos or ethics opinions cited by the state contain any wording telling the recipient that a violation can result in criminal penalties. As an example, a state or county attorney who misses a statute of limitations or fails to advise his client of a settlement offer knows his conduct constitutes ethical violations subjecting him to an OLR investigation, but he has no reason to believe that same conduct would warrant a visit from the local sheriff because it is not a codified criminal offense. In contrast, if the same attorney accepts money in exchange for legal action or pilfers from an escrow account, he knows his conduct constitutes

accepting a bribe or theft, a violation of both the SCR and criminal prohibitions.

There also is no notice to an employee connecting a violation of the Assembly Employee Handbook for engaging in partisan activity on state time with criminal felony sanctions. Standing, as articulated above, is determined by an objective evaluation as to whether appellants' conduct is clearly proscribed by the statute. The state's arguments on standing are without merit.

III. THE STATE'S CHOICE OF NON-STATUTORY SOURCES FOR DEFINING DUTIES FURTHER DIMINISHES THE VALIDITY OF ITS ARGUMENTS.

A. Introduction.

The court of appeals changed the face of criminal law in the State of Wisconsin by accepting the state's argument that a court can construe a criminal statute by "filling in the blank" and by cobbling together various advisory administrative materials to define an element of a criminal statute. The nonstatutory sources the court of appeals relied upon were an email from Representative Brancel, memos, the Assembly Employee Handbook and a Wisconsin Ethics Board Opinion. As a threshold matter, it is the appellants' position that these selectively chosen outside sources are inappropriate to

consider for purposes of imposing criminal consequences. Further, a close examination of these outside sources demonstrates the constitutional vagueness in this case.

B. Assembly Rules.

The Assembly Employee Handbook, emails from Representative Brancel and memos sent by the chief clerk neither constitute nor are part of the Assembly Rules. The actual Assembly Rules are passed by resolution of the entire Assembly at the commencement of each legislative session. For example, the Assembly Rules for 1999-2000 were adopted January 14, 1999 per Assembly Resolution 3. Pursuant to Assembly Rule 94(3)(a), the rules were published in pamphlet form. Assembly Rules 2(1) and (3)(s) identified by the appellants throughout this case are excerpted from the Assembly Rules adopted by resolution. The Assembly Employee Handbook, emails and memos relied upon by the state are not part of the Assembly Rules. They were not adopted by resolution nor were they published per Rule 94(3)(a).

This difference is important for two reasons. First, the actual Assembly Rules contain no prohibition against engaging in political activity on state time or using state resources. Second, and more

importantly, the Assembly Rules incorporate the recognition that those limited number of individuals who assume leadership roles in the Assembly have duties that are of a highly-charged and political nature. The requirement that a leader carries out the wishes of his party's legislative membership (Assembly Rule 2(1)) or the custom of his position (Assembly Rule 3(s)), mandates that that leader engage in partisan or political activity. These differences are compounded by the fact that neither in the Assembly Rules nor in the sources cited by the state is there any guidance on how to differentiate legislative activity from campaign or political activity.

C. Wisconsin Ethics Board Opinion.

The state argues that spending taxpayer money on campaigns is prohibited through an advisory opinion of the Wisconsin Ethics Board. (SB.32). The state includes in its appendix a copy of the referenced opinion. (SB.App. 183-187). Examination reveals that this document has no application and does not support the argument made by the state. In fact, because the Ethics Board Opinion is silent on any prohibition of political or campaign activity on state time or using state resources, it is logical to conclude that silence condones such activity, or at least does not prohibit it. The appellants are not

charged with any of the other prohibitions listed in the opinion. By choosing to rely on a document that contains no prohibition, the state illustrates the uncertainties and ambiguities that result when a prosecutor relies on nonstatutory sources as the basis for criminal charges.

D. Construction Problems When Dealing With Non-Statutory Sources.

None of the outside sources cited by the state were written by the authors in an effort to define an element of the felony misconduct statute. The use of such sources raises numerous questions for a court that tries to apply these non-statutory sources to define a crime:

- Who or what is a qualified source when trying to apply an email, a memo or a handbook?
- Should a court apply rules of statutory construction when interpreting these sources?
- Can the court incorporate policy statements from other statutory sources when the policy does not address the criminal statute?
- How many sources must be consulted when one or more source fails to define the term completely?
- How are conflicting sources interpreted or what use is made of a source that partially addresses an issue but, by

its silence, leaves open the interpretation that the unstated definition means there is no definition?

These and other questions illustrate the problem of using non-statutory sources to form the basis for an element of a criminal offense. Not only are citizens unaware of what could be used to define an element, but there are no standards for selecting or interpreting the sources. The criminal law and constitutional restrictions do not contemplate the reach made by the state to find non-statutory sources to interpret the elements of the misconduct statute.

CONCLUSION

For all the forgoing reasons, defendants-appellants-petitioners Jensen, Foti and Schultz urge this Court to reverse the court of appeals and remand this case to the circuit court ordering a dismissal of the complaint.

Dated this 30th day of September, 2004.

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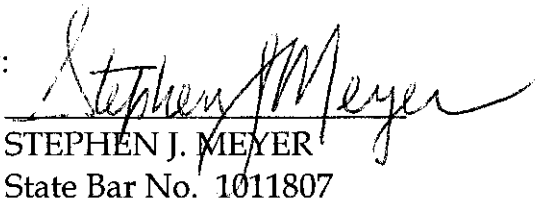
By: 
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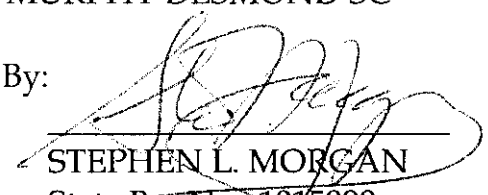
By: 
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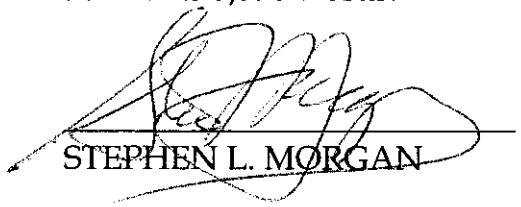

STEPHEN L. MORGAN

IN THE SUPREME COURT
STATE OF WISCONSIN

STATE OF WISCONSIN,
Plaintiff-Respondent, Appeal No. 03-0106-CR

v.

SCOTT R. JENSEN, STEVEN M. FOTI,
and SHERRY L. SCHULTZ,
Defendants-Appellants-Petitioners.

APPEAL FROM THE DECISION OF THE COURT OF APPEALS, DISTRICT IV ENTERED ON APRIL 1, 2004, AFFIRMING DECISION AND ORDER ENTERED IN DANE COUNTY CIRCUIT COURT ON JANUARY 10, 2003, THE HONORABLE DANIEL R. MOESER, PRESIDING

SUPPLEMENTAL REPLY BRIEF PER SUPREME COURT ORDER OF OCTOBER 26, 2004 FOR DEFENDANTS-APPELLANTS-PETITIONERS SCOTT R. JENSEN, STEVEN M. FOTI AND SHERRY L. SCHULTZ

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Respondent amended its appendix to submit a 1978 Ethics Opinion. (R.App.184-186) Respondent relies on this Opinion and other secondary sources in an attempt to establish that the "duty" under §946.12(3) prohibits state employees from engaging in political activity on state time.

Rather than being a clarification, the Ethics Opinion actually contradicts other sources with its statement that political activities are legal.

> In our reply we shall refer to "campaign activity" or "campaign purpose." We prefer these terms to "political activity" *because "political" often embraces a wide variety of actions pertaining to the affairs of government in which a state official or employe might properly engage in the exercise of his or her official functions.*

(R.App.184) (emphasis added).

The Ethics Opinion differs from the Assembly Employee Handbook ("[p]olitical activity is not permitted during working hours") (R.App.160) and the email ("political activity, whether partisan or non-partisan is not permitted during working hours"). (R.App.105) The Ethics Opinion is also contrary to the conclusion reached by the Court of Appeals in this case:

> Moreover, the Assembly Employe Handbook, the email from former Assembly Speaker Brancel, the memo from Charlie Sanders, and the Ethics Board advisory opinion

> provide unambiguous guidance as to when the lines between legislative activity and political activity are crossed.

State v. Jensen, 2003 WL 349659, ¶36. (Ct. App 2003).

By its own words, the Ethics Opinion recognizes that legislative personnel may properly engage in political activity on state time. Respondent, by offering the Ethics Opinion as a source of "duty," has muddied the waters by citing inconsistent sources.

Does the Opinion help employees understand their obligations in regard to "campaign activity"? The Ethics Opinion defines "campaign activity" as "activity arising independently of official functions . . . ." (R.App.184) One such "official function" was permitted by §11.265, Stats. Appellants note that pursuant to §11.265, legislative employees may solicit/accept campaign contributions during state time in connection with a legislative campaign committee.

One of the four permitted legislative campaign committees was the Republican Assembly Campaign Committee ("RACC"). This committee could lawfully raise campaign funds.

> Legislative campaign committees are operated by the partisan caucuses in the two houses of the Wisconsin Legislature. The four committees receive and expend

> funds to assist candidates and incumbents seeking election or re-election to the legislature.

Katzman v. State Ethics Board, 228 Wis. 2d 282, 299 n.11, 596 N.W.2d 861 (Ct. App. 1999).

Despite the Ethics Opinion permitting "official functions" and §11.265, the Respondent repeatedly alleged in the Complaint that the appellants conducted RACC meetings on state time and engaged in other campaign functions for RACC. (See e.g. R.App.106, 108-111.)

CONCLUSION

The Ethics Opinion recognized (i) that campaign activity is permitted if part of an official function and (ii) that political activities are legally permitted. Respondent creates vagueness by citing inconsistent sources that allegedly establish the prohibited "duty." Adding the Ethics Opinion to the record on this appeal has hurt, not helped, Respondent's attempt to identify a prohibited "duty."

Respectfully submitted this 29th day of October, 2004.

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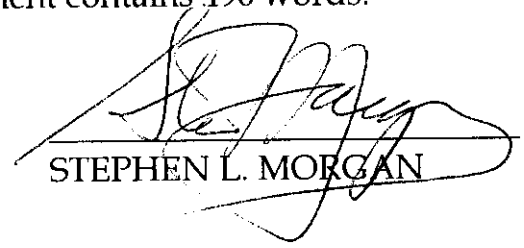

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